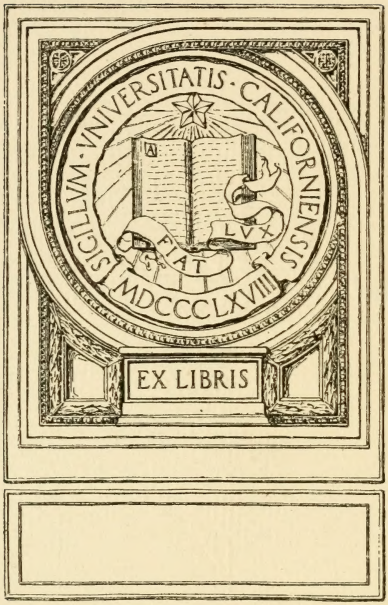
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THE CANADIAN CONSTITUTION

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THE CANADIAN CONSTITUTION

AS INTERPRETED BY

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL IN ITS JUDGMENTS.

BY

EDWARD ROBERT CAMERON,

ONE OF HIS MAJESTY'S COUNSEL, AND REGISTRAR OF THE SUPREME COURT OF CANADA.

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PREFACE

THE frequency, in recent years, with which questions involving the limits of provincial and federal jurisdiction are raised, in the courts, has made it desirable to have a collection in one volume of all the decisions of the Judicial Committee which deal with the Canadian Constitution. This primarily is the *raison d'être* for the present work. That such a collection should be as useful as possible, the writer has added cross-references which indicate what portions of the earlier judgments have been discussed in later cases and in what respect they have been confirmed or modified. The writer has attempted to trace the development of the judicial institutions in Canada, and the growth of self-government from the earliest establishment of British rule down to the present day. While recognizing the difficulty there is in attempting to lay down with accuracy the boundary line between federal and provincial powers, the writer has undertaken to present what he trusts will prove a serviceable key to lawyers and others who at times are called upon to decide upon the validity of Canadian legislation. The recent Imperial Orders-in-Council which provide for appeals direct to the Judicial Committee from Provincial Courts are printed in full in Appendix "A," and the British North America Act, 1867, in Appendix "B."

The writer desires to express his indebtedness to the Incorporated Council of Law Reporting for England and Wales for its consent to the re-publication in this work of its reports of the judgments of the Judicial Committee which deal with the Canadian Constitution.

E. R. CAMERON.

OTTAWA, *November* 1, 1914.

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ABBREVIATIONS

adh.	=	adhered to
aff.	=	affirmed
appl.	=	applied
appr.	=	approved
disappr.	=	disapproved
disc.	=	discussed
dist.	=	distinguished
expl.	=	explained
fol.	=	followed
quest.	=	questioned
quo.	=	quoted
ref.	=	referred to
rel.	=	relied on.

ADDENDA ET CORRIGENDA

THE WINDSOR, ESSEX, &C., RAILWAY CO. *v.* NELLIS, p. 33.

On October 20, 1914, the Judicial Committee after hearing this appeal on the merits reviewed its previous order, granting leave to appeal, and on further consideration held that the proceeding in this case was not one at common law, but a proceeding in equity, and that an appeal lay as of right to the Supreme Court from a judgment of the court below pronounced in 1908, and that no appeal having been taken from that judgment within the time prescribed by sec. 71 of the Supreme Court Act, the judgment of the court below was final, that the Supreme Court was right in so holding, and that accordingly no leave to appeal should have been granted.

THE JOHN DEERE PLOW CO. *v.* WHARTON, pp. 111, 113, 117.
Fully reported in Appendix "C."

This decision has determined some very important principles which are to be applied in construing secs. 91 and 92 of the British North America Act.

1. The jurisdiction conferred upon the Dominion and the Provinces by secs. 91 and 92 respectively with regard to the concrete subject matters therein set out cannot be curtailed, as regards 91, or extended as regards 92, by the general terms of sec. 92 (13)—*viz.* Property and Civil Rights in the Province. This principle was applied in the present case, and as regards the incorporation of companies with provincial objects (92 (11)) it was held that 92 (13) had no application.

2. As regards companies which do not fall under 92 (11), the sole legislative control rests with the Dominion under its general power to legislate with respect to Peace, Order, and Good Government under the first part of sec. 91.

3. The legislative jurisdiction conferred upon the Dominion by 91 (2), the Regulation of Trade and Commerce, must, like Property and Civil Rights in the Province (92 (13)), receive a limited interpretation, but as regards companies which do not fall under 92 (11) it conferred the right to prescribe to what extent their powers should be exercisable throughout the Dominion and what limitations should be placed on such powers.

4. Although the Dominion could not under 92 (2) oust entirely the power vested in the province by 92 (13), and could not confer powers which might be exercised in contravention of laws of the province that restricted the rights of the public in the province *generally*, yet the status and power of Dominion companies cannot be destroyed by provincial legislation. In other words, provincial legis-

lation, however framed, which has the effect in *substance* of interfering with the status or corporate capacity of Dominion companies to carry on business in every part of the Dominion, is ultra vires.

5. While a province can enact laws of general application under the powers conferred by sec. 92, which will affect Dominion companies, *e.g.* provincial statutes of Mortmain, Direct Taxation, or laws regulating contracts, yet this will not authorize legislation which really strikes at *capacities,* which are the natural and logical consequences of the incorporation by the Dominion of companies with other than provincial objects.

ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA *v.* ATTORNEY-GENERAL FOR THE DOMINION OF CANADA, pp. 111, 117. Fully reported in Appendix "C."

In this case the question for determination was the validity of certain provincial legislation (Alberta Railway Act, 1907, sec. 82) which authorized a provincial railway company "to take possession of, use, or occupy any lands belonging to any other railway company, use and enjoy the whole or any portion of the right of way tracks, &c., of any other railway company . . . subject to the approval of the Lieutenant Governor in Council," and which by a later Act (Alberta Statutes, 1912, c. 15, s. 7) was declared to extend in its operation "to the lands of every railway company or person having authority to construct or operate a railway otherwise than with the legislative authority of the province of Alberta."

The amended legislation therefore applied to Dominion Railway Companies, and a question was referred to the Supreme Court of Canada with respect to the validity of this legislation. It was held that the Province had no power to affect by legislation the line or works of such a railway.

THE CANADIAN CONSTITUTION

AND THE

JUDICIAL COMMITTEE

OF THE

PRIVY COUNCIL

BOOK I

COLONIAL GOVERNMENT

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The history of Canada under English rule substantially begins with the arrival of Governor Cornwallis in Halifax Harbour, in 1749, accompanied by a fleet of transports laden with settlers and their families, some 4000 persons. The presence of so considerable a body of people made it necessary that laws should at once be promulgated to preserve peace and order in the community, and authority to do so was given in the Commission to the Governor.

Two systems of government had grown up in the American colonies at this time, which were fundamentally opposed to each other; one, which had its development in the New England colonies, represented the most advanced form of self-government then known; the other, to be found in Virginia and the other southern plantations, was bureaucratic in its nature, and there the inhabitants were denied all effective control in the administration of their affairs. It was a cardinal feature of the English colonial system of government, that the economic life of the colonies should be subordinate to that of the mother country. This principle

never was accepted in New England. The English Navigation Laws, which required that all commodities exported or imported should be carried in English ships, and the Instructions to the Governors, which required that no encouragement should be given to colonial manufactures that interfered with those of the United Kingdom, were openly flouted and could not be enforced.

The system in force in Virginia naturally commended itself to the English authorities, and this was adopted throughout the provinces of British North America.

Although, as we shall find, provision was made in the Commissions and Royal Instructions given to the Governors, for the establishment of Legislative assemblies, the same instructions reserved to the King in his Privy Council the power of disallowance, and the supremacy of the British Parliament was proclaimed (6 Geo. III, c. 12) by enacting that "Parliament had had, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America subject to Great Britain." As late as 1865, the Imperial Parliament affirmed its supremacy by stating (28 & 29 Vict. c., 63) that any colonial law which is, or shall be in any respect, repugnant to the provisions of any Act of Parliament extending to the colony, shall, to the extent of the repugnancy, be null and void.

Imperial control over the colony was directly enforced through the following agencies :

(*A*) The municipal machinery which provided for the administration of local affairs.

(*B*) The consent of the Governor as the King's representative, to the enactment of all laws passed by the legislature, and the reserve power of disallowance.

(*C*) The prerogative right of constituting all courts, and appointing all judges and magistrates having civil and criminal jurisdiction.

(*D*) The prerogative right of appeal to the King in his Privy Council.

A. IMPERIAL CONTROL THROUGH MUNICIPAL INSTITUTIONS

By far the most important of these agencies, because it affected in an intimate way the everyday life of the people, was taxation,

and the control of the collection and expenditure of the money supplied by the people for their local purposes and needs. The function at this time performed by the Magistracy or Justices of the Peace, lent itself to these requirements in the most complete manner.

Although the cities and boroughs of England had a large measure of self-government, no such thing was to be found in the counties. For centuries the Justices of the Peace, sitting alone or in Quarter Sessions, represented substantially the majesty of the law, so far as the great body of the people was concerned. They had jurisdiction over all minor offences, and over the early stages of the trial of all crimes, however serious. They had also a civil jurisdiction with respect to claims for small amounts, and in addition controlled all the municipal and fiscal affairs of the county.

Quarter Sessions

The system of municipal government, which was imposed upon the provinces of Canada, Nova Scotia, and New Brunswick, at the date of Lord Durham's report (1839), was as follows: In Lower Canada, owing to the disinclination of the people to tax themselves directly for local purposes, no attempt had been made to establish self-government. In the other provinces, the Governor or Lieutenant-Governor in Council, pursuant to his Commission, appointed Justices of the Peace for each county. The office was one of considerable importance, and care was taken to have the positions filled by gentlemen whose sentiments and political views were approved by the Crown's representative. Each county comprised a number of parishes or townships, and the county was the unit of government. The justices of the county, sitting together in Quarter Session, either appointed all the municipal officers—the practice followed in the Maritime provinces—or, as in Upper Canada, directly controlled the officials, after each township, in town meeting called by two justices, had elected its clerk, assessor, collector of taxes, overseer of highways, &c. With the valuation roll before them, the Justices in Quarter Session determined the amount of money required for public purposes, how it should be expended, and the rate to be assessed on the rateable property. The taxes received by the collector were paid to a County Treasurer appointed by them. The Quarter Sessions regulated the fees of the township officers, made all contracts for local works, and had control of the construction and repair of all highways.

Charles Buller's instructions to his municipal commissioners, printed as an appendix to Lord Durham's report, says: "In Upper Canada there appears to exist a systematic, comprehensive and popular organisation of the townships. The people of these districts are entrusted with the freest election of municipal officers, but the officers thus chosen seem to be entrusted with hardly any duties, and certainly are invested with hardly any of the powers which are necessary for a really efficient municipal government. The inhabitants of these townships appear to have a very popular choice of mostly useless functionaries."

In his report upon Nova Scotia, Buller says: "The want of roads and the scattered position of the population fettered their industry; while the institutions of their new country, from which every vestige of the municipal system of the old colonies was jealously excluded, prevented them from applying those remedies by which the citizens of the United States have freed themselves from similar inconveniences."

The early attempts to establish municipal institutions in Upper Canada after 1840 were accompanied by restrictions upon the freedom of action of the municipal Council. It was required that the Warden, or Chairman of the Council, should be appointed by the Lieutenant-Governor in Council. All by-laws had to be forwarded to the Provincial Secretary, and might be disallowed, while the Lieutenant-Governor in Council could at his pleasure dissolve the Council. The policy of the Government was to entrust no more than a semblance of power to the people. It was not until 1849, after responsible government had been firmly established in the province, that a Municipal Act received the Royal Assent, which, in fact as well as in name, conferred upon the people full control of their municipal affairs.

B. IMPERIAL CONTROL THROUGH THE GOVERNOR AS A BRANCH OF THE LEGISLATURE

The Governor, as the representative of the sovereign, and a necessary party to all legislative acts, from the first exercised an effective control over all colonial legislation. From the earliest days, the Royal Commissions to the Governors of Canada and the Maritime Provinces provided for the establishment of a legislative assembly, elected by the freeholders, which with the advice and assent of the governor and his council should make laws for the peace, welfare, and good government of the provinces. This

direction was not given from a desire to confer self-government upon the colonists, but rather because it was conceived that the Englishman, in carrying with him to the colonies so much of the English law as was adapted to his colonial condition, was entitled to require that no tax should be imposed on him except through a colonial legislature.

Representative government was accordingly established under the Royal Instructions in Nova Scotia in 1773, in New Brunswick in 1784, and in Upper and Lower Canada by the Imperial Constitutional Act of 1791.

It is foreign to the purpose of this work to trace the growth of responsible government in Canada. It is sufficient to say that, prior to Lord Durham's report in 1839, the government of the colonies was carried on by the Governor, with the advice of his Executive Council, and only such bills of the Assembly became law as the Governor in Council approved. The fact that the Governor had control of certain casual revenues of the crown, derived from the sale of public lands, customs duties, &c., permitted him to put restraint upon the Assembly, which would have been quite impossible had the executive been compelled to rely upon a vote of the representative chamber for its necessary supplies. The Executive Council, the law officers, and the heads of the administrative departments of government were appointed and retained in office, without any regard to the wishes of the representative chamber. The Assembly being unable to inquire into the expenditures of public moneys derived from the crown's revenues, or with respect to the conduct of the crown's officers, engaged in constant and bitter warfare with the executive government. While the representative chamber, on the one hand, treated with scorn the recommendations of the Governor and his council, so, on the other, the Governor and the legislative council rejected all bills which did not meet with their approbation. Lord Durham's report says :

> "The representative body of Upper Canada was before the late election hostile to the policy of the Government ; the most serious discontents have only recently been calmed in Prince Edward Island and New Brunswick ; the Government is still, I believe, in a minority in the Lower House in Nova Scotia, and the dissensions of Newfoundland are hardly less violent than those of the Canadas. It may fairly be said that the natural state of government in all these colonies is that of a collision between the executive and the representative body. In all of them the administration of public

affairs is habitually confided to those who do not co-operate harmoniously with the popular branch of the legislature, and the Government is constantly proposing measures which the majority of the Assembly reject, and refusing its assent to bills which that body has passed."

"It was a vain delusion to imagine that by mere limitations in the constitutional act, or an exclusive system of government, a body, strong in the consciousness of wielding the public opinion of the majority, could regard certain portions of the provincial revenues as sacred from its control, could confine itself to the mere business of making laws, and look on as a passive or indifferent spectator, while those laws were carried into effect or evaded, and the whole business of the country was conducted by men in whose intentions or capacity it had not the slightest confidence."

This situation having continued for years, and every constitutional effort to obtain redress having been exhausted, recourse was finally had to arms, and during the last month of 1837 an insurrection in both provinces had to be trampled out in blood. Under these critical circumstances, Lord Durham was appointed Governor-General of Canada in 1838. His report, which was laid before the Imperial Parliament in 1839, contained an exhaustive review of the causes which led to the rebellion, and enunciates the principles of responsible government which should be applied, not only in Canada, but in all the colonies of the Empire having representative institutions. He there says:

"Every purpose of popular control might be combined, with every advantage of vesting the immediate choice of advisers in the crown, were the colonial governor to be instructed to secure the co-operation of the assembly in his province, by entrusting its administration to such men as could command a majority, and if he were given to understand that he need count on no aid from home in any difference with the assembly, that should not directly involve the relations between the mother country and the colony."

This principle of responsible government was, at first, not acceptable to the home authorities, and it was not fully and completely recognised until the office of Governor was filled by Lord Elgin in 1848, when, upon the resignation of his Ministers following a vote of non-confidence, he entrusted the leader of the Opposition with the formation of a new Government. Lord Durham's report recommended a legislative union of the provinces of Upper and Lower Canada, which was effected by the Imperial Act 3 & 4 Vict. c. 35, and this union lasted until the confederation of Canada with Nova Scotia and New Brunswick was brought about in 1867.

Responsible government was conceded to both New Brunswick and Nova Scotia in 1847, under instructions from the Colonial Secretary, Earl Grey. Prince Edward Island received it in 1851. The other provinces of Canada, viz. British Columbia, Manitoba, Alberta, and Saskatchewan, became a part of the Confederation at a later date, when the principles of responsible government were so well recognised that it necessarily followed upon the grant of representative institutions.

C. IMPERIAL CONTROL THROUGH COURTS OF JUSTICE

Nova Scotia

The establishment of Courts of Justice in a new colony was a function of the Royal prerogative, and always constituted an important feature of the Commission and the Royal Instructions. Governor Cornwallis was authorised to provide for the establishment of a court of inferior jurisdiction, and of another and principal court, to consist of the Governor and his Council, to be called the General Court. There was at this time, a general court established in the State of Virginia, and the Executive Council approved of a report of its Committee, which recommended that the form of government in the Colony of Virginia, with respect to a General Court and County Courts, was the most desirable to be followed.

This provision for the administration of justice remained in force until 1754, when Jonathan Belcher was appointed Chief Justice of the province. His commission is the original authority for the establishment of the Supreme Court in the province, and this is done in the fewest and most general terms. The Letters Patent appointed him "Chief Justice in and over our Province of Nova Scotia . . . with . . . full power and authority . . . to hear, try, and determine all pleas whatsoever, civil, criminal, and mixed, execution of all judgments to award, to make such rules and orders in the said court as may be found convenient. . . . To hold the Supreme Court of Judicature at such places and times as the same might and ought to be held in the Province." From this time forward the Chief Justice and the Judges of the Supreme Court of Nova Scotia exercised all the jurisdiction as a Superior Court of Judicature, which previously appertained to the Governor in Council, without any ordinance or Statute, until the legislation now to be found in R.S.N.S. (1851), c. 126, which provided that the

Supreme Court should have within the province the same powers as are exercised by the Courts of Queen's Bench, Common Pleas, and Exchequer in England.

A Court of Chancery was also established in the province, but it was subsequently abolished and its jurisdiction vested in the Supreme Court (R.S.N.S., 2nd series, p. 413).

In 1884 the principles of the English Judicature Act of 1873 were adopted. In this province thereafter the same court administered both law and equity, and, as in England, in all matters in which there was any conflict or variance between the rules of equity and the rules of Common Law, it was declared that the rules of equity should prevail.

New Brunswick

This province was separated from Nova Scotia, and given an independent legislative existence in 1784. In the same year George D. Ludlow was commissioned Chief Justice of the Supreme Court of Judicature of New Brunswick. The Letters Patent appointed him to be "Chief Justice of our Supreme Court of Judicature of, and in, our Province of New Brunswick in America," and followed substantially the language used in the commission of Chief Justice Belcher. No ordinance or statute was ever passed in New Brunswick establishing the Supreme Court of that province, and its *status* rests entirely upon the Royal Instructions and the Commission of the Chief Justice.

A Court of Equity was, at an early date, established in this province under the name of the Supreme Court in Equity, and it was not until 1909 (9 Edw. VII, c. 5) that the principles of the English Judicature Act were introduced. By that Act it was declared that the Supreme Court of New Brunswick, as constituted as a Court of Common Law and Equity, and possessing original and appellate jurisdiction in civil and criminal cases, should continue. The Supreme Court by that Act has two divisions, the Chancery Division and the King's Bench Division, and all Equity actions are to be instituted and disposed of by the Chancery Division. Provision, however, is made that where there is a conflict between the rules of Equity and Common Law, those of Equity should prevail.

In 1913 the Judicature Act was amended, and the Supreme Court declared to consist of three divisions, viz. an Appeal Division,

to be called the Court of Appeal, a Chancery Division, and a King's Bench Division. The Court of Appeal consists of the Chief Justice of New Brunswick and two Judges. The Chancery Division consists of three Judges, and the King's Bench Division consists of the Chief Justice and three other Judges.

Old Province of Quebec

By the commission given to Governor Murray in 1763, he is empowered to constitute courts of judicature and public justice, and given power and authority to appoint judges, justices of the peace, and other necessary officers for the administration of justice. In his instructions he is directed, in constituting such courts, to consider what had taken place in the other colonies in America, particularly in Nova Scotia.

In 1764 the Governor in Council passed an ordinance constituting a Supreme Court of Judicature or Court of King's Bench; the Chief Justice was to preside in this court, subject to an appeal to the Governor in Council where the matter in controversy exceeded £300 sterling, and with a further appeal, in matters exceeding £500 sterling, to the King in his Privy Council. The Commission of Chief Justice Hay in 1766 is substantially in the same language as we find in the Commission of Chief Justice Belcher in Nova Scotia. He is appointed "Chief Justice of our Supreme Court of Judicature for the Province of Quebec;" but the court was not designated in this way in the Governor's ordinance, and the expression "Supreme Court of Quebec" did not obtain a place in the legal terminology of that province.

The Commission and Instructions to Governor Sir Guy Carleton in 1768, contained similar powers for the establishment of courts of judicature, with an appeal to the Governor in Council and the King in his Privy Council. The Quebec Act, 1774, repealed all the ordinances relating to the administration of justice, but the Instructions given to Carleton in 1775 authorised him to establish a Superior Court of Criminal Justice, to be called the Court of King's Bench, and also a Superior Court of Common Pleas, with an appeal in civil matters to the Governor in Council in certain cases. Pursuant to this authority, in 1777 the Governor in Council established a Superior Court of Common Pleas. By another ordinance of the same date, a Superior Court of Criminal Jurisdiction, to be known as the Court of King's Bench, was established.

The Constitutional Act of 1791, which made provision for the division of the old province of Quebec into two new provinces, to be called Upper and Lower Canada, provided that all laws, statutes, and ordinances should remain in force until altered or varied by the legislatures of the new provinces.

Lower Canada

At the first Parliament of Lower Canada, held in 1793 (34 Geo. III, c. 6), a court of original jurisdiction in civil and criminal matters, under the name of the Court of King's Bench, was established. This continued until 1849, when the jurisdiction of the Court of Queen's Bench was limited to a criminal and appellate civil jurisdiction, and its former civil jurisdiction as a superior court of record was vested in a new court called the Superior Court. Subsequently provision was made, by which an appeal lay from a judgment of the Superior Court to three members of the same court, sitting as a Court of Review. In 1866 the laws of the province of Quebec were codified. The Civil Code is modelled on the French Code Napoléon, but the law is by no means the same. The law in France, which became the law of Quebec, is the Coutume de Paris, which was in force in France when Louis XIV, in 1663, established a Sovereign Council in Quebec. The Civil Code is based upon the Coutume de Paris of 1663, and edicts and ordinances subsequent to that date, which were registered with the Sovereign Council, local arrêts and règlements of the Sovereign Council, and other authorities administering the affairs previous to the Conquest.

Upper Canada

In 1794 the first Parliament of Upper Canada constituted a court of law, to be called the Court of King's Bench for Upper Canada, which should be a Court of Record of Original Jurisdiction, and possess all powers and authorities, as by the law of England were incidental to a Superior Court of Civil and Criminal Jurisdiction. A Court of Chancery was established in 1837 (7 Wm. IV, c. 2). In 1849 a Court of Common Pleas was established (12 Vict., c. 63) to be a Court of Record, with the powers of any Court of Common Law at Westminster, and having criminal and civil jurisdiction.

The principles of the English Judicature Act were adopted in

the province of Ontario in 1881 (44 Vict., c. 5). The jurisdiction of all the courts was transferred to a new tribunal called the Supreme Court of Judicature for Ontario, composed of two divisions, the High Court of Justice and the Court of Appeal. The High Court of Justice consisted of three divisions, Queen's Bench, Common Pleas, and Chancery, each division consisting of three judges, forming a Divisional Court. In certain cases an appeal lay from a single judge and the Divisional Court to the Court of Appeal. A number of changes have been made from time to time in the Constitution of this court, the last being as recent as 1913 (3 & 4 Geo. V, c. 19), when the previous Judicature Act was repealed, and a new one put into effect, which declared that the Supreme Court of Ontario was continued as a Superior Court of Record, having civil and criminal jurisdiction.

The Supreme Court of Ontario consists of two divisions, the Appellate Division and the High Court Division. This legislation does away with the Court of Appeal as a tribunal sitting in appeal from the Divisional Courts. The old Divisional Courts are abolished and two divisions of the Supreme Court are substituted for them, having co-ordinate powers as Appellate Courts. One of the appellate divisions consists of the Chief Justice and former Justices of the Court of Appeal, and is called the First Appellate Division. The Second Appellate Division is made up of five judges, drawn from the fourteen judges of the High Court Division, who are selected to serve in that capacity for one year. There is provision for a Third Appellate Divisional Court where the volume of business requires this to be done.

The Appellate Division exercises that part of the jurisdiction vested in the Supreme Court of Ontario which on the 31st December 1912 was vested in the Court of Appeal and in the Divisional Courts of the High Court, and it is provided that such jurisdiction shall be exercised by a Divisional Court of the Appellate Division in the name of the Supreme Court of Ontario.

Manitoba

The province of Manitoba was established in 1870 by 33 Vict., c. 3 (Can.). The legislature of the new province in 1871 established a Supreme Court for the province. In 1872 the title of the court was changed to that of the Court of Queen's Bench, and it was given power to sit as a Court of Error and Appeal, and to

exercise Appellate, Civil. and Criminal Jurisdiction. In 1880, by the Consolidated Statutes of Manitoba, the court was continued, and declared to possess all the powers and jurisdiction of courts of Common Law and Chancery and any court in England having cognisance of property and civil rights, crimes and offences. In 1895, by 58 & 59 Vict., c. 6, the provisions of the English Judicature Act with respect to the administration of law and equity were introduced and made applicable to the Court of Queen's Bench. By the King's Bench Act, R.S.M., 1902, c. 40, s. 23, it is provided that the Court of King's Bench is and shall continue to be a Court of Record of Original and Appellate Jurisdiction, and shall possess and exercise all such powers and authorities, as by the laws in England are incidental to a Superior Court of Record of Civil and Criminal Jurisdiction in all matters civil and criminal whatsoever, and shall have, use, and enjoy, and exercise all the rights, incidents, and privileges of said courts, as fully, to all intents and purposes, as the same were on the 15th day of July 1870 possessed, used, exercised, and enjoyed by any of her late Majesty's Superior Courts of Common Law at Westminster, or by the Court of Chancery at Lincoln's Inn, or by the Court of Probate, or by any other court in England having cognisance of property and civil rights and of crimes and offences.

By section 26 the court is given all the jurisdiction and powers as by the laws in England were on the 15th day of July 1870 possessed by the Court of Chancery in England in certain cases therein specified.

Saskatchewan

The province of Saskatchewan was constituted a province of Canada by 4 & 5 Edw. VII, c. 42 (Can.), and one of the first Acts of its legislature was to establish a Supreme Court of Record, of original and appellate jurisdiction, as well as criminal and civil jurisdiction, under the name of the Supreme Court of Saskatchewan (R.S.S., c. 52). The Judicature Act of this province contains substantially the provisions of the English Judicature Act.

Alberta

This province was established in 1905 by 4 & 5 Edw. VII, c. 3 (Can.). By an Act of its legislature the Supreme Court of Alberta is constituted, and is declared to have all the powers previously vested

in the Supreme Court of the North-West Territories, and the powers of the English Courts of Chancery, Queen's Bench, Common Pleas, &c. The provisions of the English Judicature Act are also adopted in this legislation.

British Columbia

In 1871, by Imperial Order in Council pursuant to the British North America Act, 1867, British Columbia was admitted as a province of the Dominion. Previous to 1870 there was a Supreme Court of Civil Justice for Vancouver Island, and also a Supreme Court for the mainland, respectively called the Supreme Court of Vancouver Island, and the Supreme Court of the mainland of British Columbia. These two courts were merged into the Supreme Court of British Columbia in 1870. By the R.S.B.C. (1911), c. 133, the rules by which law and equity are to be administered in this province were established, which are substantially those of the English Judicature Act.

Prince Edward Island

In this province a Court of Common Law, called the Supreme Court of Judicature, was established at an early date under the Royal Instructions. There is also a Court of Chancery, of which the Lieutenant-Governor is nominally the Chancellor, but its judicial functions are performed by the Vice-Chancellor. An appeal lies from the Vice-Chancellor and Master of the Rolls to the Court of Appeal in Equity. The same judges who constitute the Supreme Court of Judicature also form the Court of Appeal in Equity.

COLONIAL COURTS OF APPEAL

A feature of the Royal Instructions to Governor Cornwallis of great importance, having regard to the desire to retain a direct control over the affairs of the province, were the provisions which constituted the Governor in Council a Court of Error and Appeal from the Courts of Judicature, and gave a further appeal to the King in his Privy Council. Some of the New England Colonies about this time repudiated the exercise of the Royal Prerogative, which permitted appeals to the King in his Privy Council, and in the instructions a few years later (1756) given to Governor

Lawrence, elaborate provisions were made similar in their nature to those contained at that time in some of the Instructions given to the Governors of the American plantations, by which an appeal was given from the Courts of Common Law to the Governor in Council where the matter involved exceeded £300 sterling, with a further appeal to the King in his Privy Council, where the matter exceeded £500 sterling. Similar Instructions were given to the Governors of Nova Scotia, New Brunswick, and Prince Edward Island from that time forward until 1861.

Maritime Provinces

Since the right of appeal to the Governor in Council was dropped from the Royal Instructions in 1861, there has been no Provincial Court, sitting in appeal from the judgments of the Supreme Courts, in the Provinces of Nova Scotia and Prince Edward Island, but an appeal lies to the Supreme Court of Canada under the Supreme Court Act R.S.C. (1906), c. 139.

Lower Canada Court of Appeal

Statutes making provision for an appeal to the Governor in Council with a further appeal to the King in Council were amongst the first Acts of Legislation of the Parliaments of the two new provinces, into which the old province of Quebec were divided. Lower Canada legislated first by 34 Geo. III, c. 6, s. 23, which provided as follows:

> "And be it further enacted by the authority aforesaid, that the Governor, Lieutenant-Governor or person administering the Government, the members of the Executive Council of this Province, the Chief Justice thereof and the Chief Justice to be appointed for the Court of King's Bench of Montreal or any five of them (the Judges of the Court of the District wherein the judgment appealed from was given excepted) shall be constituted, and are hereby erected and constituted, a Superior Court of Civil Jurisdiction or Provincial Court of Appeals, and shall take cognisance of, hear, try and determine all cases, matters, and things appealed from all civil jurisdictions and courts, wherein an appeal by law is allowed. . . ."

In 1843 the Parliament of Canada by 7 Vict., c. 18, repealed so much of the Act of 34 Geo. III, c. 6, as related to the establishment and constitution of the Governor in Council as a Provincial Court of Appeal, and established a Court of Appeal for Lower Canada

consisting of all the Justices of the Courts of Queen's Bench in that Province, and re-enacted the provision in the earlier Act for a further appeal to the King in Council.

One of the grievances which was most bitterly complained of, particularly in Lower Canada, was the constitution of the Governor in Council as a Court of Error and Appeal. It was a Court of which often only one member was a lawyer, yet it did not hesitate at times to reverse the regular judicial tribunals, not on legal grounds, but following the prejudices or party interests of the members of the Executive Council.

> Lord Durham, in his report, says: "The Appellate Jurisdiction of Lower Canada is vested in the Executive Council, a body established simply for political purposes, and composed of persons in great part having no legal qualifications whatsoever. . . . The laymen, who were present to make up the necessary quorum of five, as a matter of course, left the whole matter to the presiding Chief Justice, except in some instances, in which party feelings, or pecuniary interests are asserted to have induced the unprofessional members to attend in unusual numbers and to disregard the authority of the Chief Justice and pervert the law. . . ."

In 1849 the Courts of the Province were reorganised, and by 12 Vict., c. 37, the Court of Appeal Act was repealed. The jurisdiction of this Court was vested in the Court of King's Bench, which was given all the appellate jurisdiction previously vested in the Court of Appeals.

Province of Quebec

The appellate jurisdiction of the Court of King's Bench (appeal side) is now to be found in Articles 42–47 of the Code of Civil Procedure, and, with certain qualifications, applies to final judgments of the Superior Court, Court of Review, and Circuit Court.

Appeals in Upper Canada

In Upper Canada, as we have seen in Lower Canada, one of the earliest Acts of the first Parliament, held in 1794, was to provide for an appeal from the Superior Courts of Law to the Governor in Council with a further appeal to the King in his Privy Council.

The statute of Upper Canada, 34 Geo. III, c. 2, sec. 33, reads as follows:

> "And be it further enacted that the Governor, Lieutenant-Governor, or person administering the government of this Province,

or the Chief Justice of the Province together with any two or more members of the Executive Council of the Province, shall compose a Court of Appeal for hearing and determining all appeals from such judgments or sentences as may lawfully be brought before them."

In 1849, by 12 Vict., c. 63, the Governor in Council as a Court of Error and Appeal was abolished, and a new Court established consisting of all the judges of the Superior Courts. The same statute provided for an appeal to the King in his Privy Council. These provisions were substantially re-enacted in 1857 by 30 Vict., c. 5, and were carried later into the Consolidated Statutes of Upper Canada as Chapter 13. In 1876 the Court of Error and Appeal received the name of the Court of Appeal.

Province of Ontario

The jurisdiction of the Supreme Court of Ontario as a Court of Appeal has been discussed *ante*, p. 12.

Manitoba

In 1906, by 5 & 6 Edw. VII, c. 18, a Court of Appeal for Manitoba was created, and had conferred upon it all the rights, powers, and duties theretofore exercised by the Court of King's Bench sitting *en banc* and as a court of appeal, from the judgment of a single judge, or verdict of a jury, or of a county court judge, or the verdict of a county court jury, except in certain criminal cases. The jurisdiction of the Court of King's Bench to sit *en banc* on the hearing of matters other than appeals or applications for new trials are preserved, and with this exception the Court of Appeal is given jurisdiction in all applications for new trials and all appeals of the nature of those which theretofore had been heard by the Court of King's Bench sitting *en banc*.

British Columbia

In 1907 a Court of Appeal was established, now contained in R.S.B.C. (1911), c. 51. By section 6 of this Act the Court is constituted as a Superior Court of Record, and has transferred to it all jurisdiction and powers, civil and criminal, of the Supreme Court, and the judges thereof sitting as a full court, that were held and exercised prior to the 25th day of April 1897, and all other appellate jurisdiction and appellate powers as were on that date exercised by the Supreme Court sitting as a full court.

New Brunswick

The Judicature Act of 1913 (3 Geo. V, c. 23) constitutes a Court of Appeal, which shall have all the appellate jurisdiction formerly possessed by the Supreme Court of the Province *en banc*, in civil and criminal matters, and have jurisdiction to hear and determine motions and appeals respecting any judgment, order, or decision of any judge or judges of the King's Bench or Chancery Division, and of any judge of the Court of Appeal.

Other Provinces

No province of Canada other than these just mentioned has a Court of Appeal.

Supreme and Exchequer Courts of Canada

The British North America Act, section 101, provides as follows:

> "The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organisation of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada."

Pursuant to this provision the Parliament of Canada in 1875, by 38 Vict., c. 11, established a Supreme Court of Canada and an Exchequer Court of Canada. The judges of the Supreme Court were, by the same Act, constituted the judges of the Exchequer Court.

The Exchequer Court Act R.S.C., c. 140 (1906)

The Exchequer Court, by the original Act, was given concurrent and original jurisdiction in all causes in which it was sought to enforce any law of Canada relating to the revenue, and all causes which might be cognisable by the Court of Exchequer in England on the pleas side against any officer of the Crown, or on its revenue side against the Crown. It also was given concurrent jurisdiction with the Courts of the Provinces in all suits of a civil nature at Common Law or Equity, in which the Crown in the interest of the Dominion of Canada was plaintiff or petitioner. It was provided that the trial of all causes should be before a single judge, and an appeal should lie to the Supreme Court of Canada.

In 1887 the Court was re-organised and separated from the Supreme Court, and an Exchequer Court judge appointed. The jurisdiction of the Court was enlarged, and made to include every claim against the Crown for property taken for any public purpose; for damages to property injuriously affected by the construction of public works; claims against the Crown arising out of death or injury to a person or to property on any public work; all claims against the Crown arising out of any law of Canada or regulation made by the Governor in Council, and all cases in which it was sought at the instance of the Attorney-General of Canada to impeach a patent of invention. From time to time increased jurisdiction has been given to the Court. It now has power to adjudicate upon disputes respecting patents of invention, copyright, trade marks, &c., and has been constituted a Court of Admiralty. An appeal lies, with certain limitations, from the Exchequer Court to the Supreme Court of Canada.

Supreme Court of Canada

During the discussion of the Bill in Parliament, it was contended by some that there was no power under the B.N.A. Act to confer upon the Supreme Court appellate jurisdiction in matters which were specially relegated to the provincial legislatures by section 92 of the Act, and that the words "administration of the laws of Canada" in section 101 did not include laws enacted by the local legislatures, but this view was not adopted, and one of the most important functions of the Court has been to determine the constitutional rights of the Dominion on the one hand, and of the provinces on the other.

In the case of the *Credit Valley Railway Co.* v. *Grand Trunk Railway Co.* (27 Gr. 232 Ont.), an application was made to Taschereau, J., in chambers on the 6th February 1880, for leave to appeal from a judgment of the Court of Chancery of Ontario without any intermediate appeal to the Ontario Court of Appeal. The application was refused on the ground that, under section 101 of the B.N.A. Act, the federal authority had power to grant an appeal only from the provincial courts of last resort, and that the provision of the Supreme Court Amendment Act, 1879 (42 Vict., c. 39, s. 6), which permitted of an appeal *per saltum* without any appeal to any intermediate court of appeal in the province, was *ultra vires* of the Dominion Parliament. (Doutre, *Constitution of Canada*, p. 337.)

This decision was, however, not followed, and on the 22nd of

June 1882, in the case of the *Bank of British North America* v. *Walker* (Cout. Dig. 88), the Supreme Court granted leave to appeal from the judgment of the trial judge without any intermediate appeal to the full court of the Supreme Court of British Columbia.

In *L'Association St. Jean Baptiste de Montreal* v. *Brault* (31 Can. S.C.R. 172), an appeal from the Court of Review to the Supreme Court of Canada, it was contended by counsel that the provision made by the Dominion Act for an appeal from the Court of Review in cases which were not appealable to the Court of Queen's Bench, was *ultra vires* of the Parliament of Canada, and that the appeal should be quashed. The motion was refused, the Court pointing out that the respondent's contention must be that all appeals heard in the Supreme Court, from all over the Dominion since its creation in 1875, in matters within the legislative jurisdiction of the provinces, were determined without jurisdiction, and that if Parliament had not the power to authorise an appeal in such cases from the Court of Review in Quebec, it had not the power to authorise it from the courts of final jurisdiction in the other provinces.

With respect to the power of the provincial legislature to limit appeals to the Supreme Court, this question was finally concluded by the judgment of the Judicial Committee in the case of the *Crown Grain Co.* v. *Day* [1908], App. Cas. 504,[1] where it is said :

> "The appellants maintain that the implied condition of the power of the Dominion Parliament to set up a Court of Appeal was that the court so set up should be liable to have its jurisdiction circumscribed by provincial legislation dealing with those subject matters of litigation which, like that of contracts, are committed to the provincial legislatures. The argument necessarily goes so far as to justify the wholesale exclusion of appeals in suits relating to matters within the region of provincial legislation. As this region covers the larger part of the common subjects of litigation, the result would be the virtual defeat of the main purposes of the Court of Appeal." The jurisdiction of the Supreme Court was sustained.

The Supreme Court Act provides that the Executive Government of the Dominion may obtain the opinion of the Supreme Court upon questions of law and fact which it submits for the Court's consideration. It was contended that this power was not conferred by the B.N.A. Act, but in the case of *The Attorney-General of Ontario* v. *The Attorney-General of Canada* [1912], App. Cas. 571,[2] this section of the Supreme Court Act was upheld.

The Supreme Court has a limited original and appellate jurisdiction.

[1] *Post*, p. 658.

[2] *Post*, p. 723.

Original Jurisdiction

The original jurisdiction of the Court is confined to comparatively few subjects.

(*a*) References by the Governor in Council with respect to constitutional questions (section 60).[1]

(*b*) References respecting bills at the request of the Senate or House of Commons (section 61).

(*c*) Habeas corpus matters. The Court has concurrent jurisdiction with the Courts or judges of the several provinces (sections 62–65).

(*d*) Certiorari. The Court has original jurisdiction to issue writs of certiorari, but only for the purpose of bringing up proceedings and papers required before the Supreme Court sitting as an Appellate Court (*re* Trepanier, 12 S.C.R. 111).

(*e*) References by judges of provincial courts in certain cases under section 67. In only one case has the jurisdiction vested in the Court by this section been exercised (*Attorney-General of Ontario* v. *Attorney-General of Canada*, 14 S.C.R. 736).

Appellate Jurisdiction

The appellate jurisdiction of the Court is contained in sections 35–43 of the Act.

Section 35 gives a general appellate civil and criminal jurisdiction.

Section 36 gives an appeal in all cases from the *final* judgment of the highest Court of *final* resort where the Court of original jurisdiction is a Superior Court, except in criminal cases.

Section 37 gives an appeal from the *final* judgment of the highest Court of *final* resort where the Court of original jurisdiction is not a Superior Court in certain limited cases.

Section 38 gives an appeal from judgments, whether *final* or *not*, of the highest Court of *final* resort where the Court of original jurisdiction is a Superior Court in certain limited cases.

Section 39 gives an appeal where the judgment is upon a special case, or upon a motion to set aside an award, or a case of habeas corpus, certiorari or prohibition, not arising out of a criminal charge. An appeal is also given in a case of proceedings upon a

[1] In *Ontario* v. *Canada* (1912, A. C. 571),[2] it was held to be *intra vires* of the Parliament of Canada to impose this duty upon the Court.

[2] *Post*, p. 723.

writ of mandamus or in a case of a judgment upon an application to quash a by-law of a municipal corporation.

Section 40 gives an appeal from the Court of Review in the Province of Quebec under the same circumstances as an appeal lies to the King in Council.

Section 41 gives an appeal in matters of rates or assessments where the appeal involves the assessment of property of the value of $10,000 or over.

Section 42 gives an appeal *per saltum*, from the Court of Original Jurisdiction where that Court is a Superior Court.

Section 43 gives an appeal in cases where the Court has jurisdiction conferred upon it by any other Act of the Parliament of Canada.

This last section authorises appeals in criminal cases as provided in the criminal code where the judgment of the Court of Appeal is not unanimous. It also confers jurisdiction in appeals from the Exchequer Court of Canada. It covers election appeals under the Dominion Controverted Election Act, also appeals in insolvency cases under the winding-up Act, and appeals from the Board of Railway Commissioners under the Railway Act.

Section 45 of the Act inhibits appeals where the judgment is made in the exercise of the judicial discretion of the Court below.

Certain other restrictions are placed upon appeals from the provinces of Quebec, Ontario, and the Yukon Territory, with the idea of limiting appeals to cases in which a substantial amount is involved (ss. 46, 48, 49).

Section 59 provides as follows: "The judgment of the Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment or order of the Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals and petitions to His Majesty in Council may be ordered to be heard saving any right which His Majesty may be graciously pleased to exercise by virtue of his royal prerogative."

In *Johnson* v. *Ministers, &c., St. Andrew's Church* (3 App. Cas. 159), it is said that the body of the clause refers to what may be called the hypothetical establishment of a Court by which appeals from the colonies are supposed to be heard, but that no such Court has been established, and that by the latter part of the section, Her Majesty's prerogative to allow an appeal, is left entirely untouched.

It has frequently been said by the Judicial Committee [1] that

[1] *Prince* v. *Gagnon*, 8 App. Cas. 103; *Clergue* v. *Murray*, 1903 A. C. 521; *C.P.R.* v. *Blain*, 1904 A. C. 455; *Townsend* v. *Cox* (1907), A. C. 514.

where a suitor, having his choice to appeal to the Supreme Court or to His Majesty in Council, elects the former remedy, it is not the practice to give him special leave except in a very strong case.

The principle above expressed is clear, but it is not always easy to see how it was applied in the later cases. Since the decision in *Clergue* v. *Murray*, in cases of this class nearly as many appeals have been granted as have been refused.

Admiralty Appeals

The only cases in which an appeal lies as of right from the Supreme Court to the Privy Council, are Admiralty appeals. This right of appeal is conferred by section 6 of the Colonial Courts of Admiralty Act (Imperial), 53 & 54 Vict., c. 27. This right of appeal was expressly decided by the Judicial Committee in *Richelieu & Ontario Navigation Co.* v. *S.S. Cape Breton* (1907, A. C. 112).[1]

D. IMPERIAL CONTROL THROUGH THE PREROGATIVE RIGHT OF APPEAL

Royal Instructions

In the early days, the "Royal Instructions" was a secret and confidential communication from the King to his representative, directing him with regard to the manner in which he should carry out the terms of his commission. Many items were treated in the same stereotyped language in all instructions, but this very fact emphasizes the uniform policy of the Crown, with respect to the colonies, and shows clearly the great distrust with which the popular branch of the legislature was viewed. Two years were allowed for the royal approval or disapproval of all legislation not urgent, and in the meantime its validity remained in suspense, and the claim of the Assembly to have the sole right to initiate all money bills was declared to be highly detrimental to the royal prerogative. While the Governor was instructed not to assent to any bills affecting commerce or shipping, or which should in any way relate to the rights and prerogatives of the Crown, until the royal pleasure thereon was known, he was informed that it was the express will and pleasure of the King that he should not, under any pretence whatever, and upon pain of His Majesty's highest

[1] *Post*, p. 639.

displeasure, give assent to any law for setting up any manufactures or the carrying on of any trades, which might be hurtful and prejudicial to the kingdom, and that he should use his best endeavours to discourage and restrain any attempts which might be made to set up such manufactures or establish such trades.

The right of appeal from local courts of justice to the Governor in Council, with a further appeal to the King in Council, was always provided for in the Instructions, and was a royal prerogative which was highly prized by the King, and seldom renounced to the colonial legislatures. Indeed the transfer of the right to regulate appeals to the legislatures of Upper and Lower Canada by the constitutional Act of 1791, appears to have escaped the notice of the colonial officers in England, and we find that the Royal Instructions, from the time of Lord Dorchester down to 1840, continue to contain the provision with respect to such appeals, and afford an example of the carelessness, or incompetence, of the officials of the English Colonial Office, which justifies the severe criticism in Lord Durham's report in 1839, where he says :

> "The repeated changes caused by political events at home having no connection with colonial affairs, have left, to most of the various representatives of the Colonial Department in Parliament, too little time to acquire even an elementary knowledge of the condition of those numerous and heterogeneous communities for which they have had both to administer and legislate. The persons with whom the real management of these affairs has or ought to have rested have been the permanent but utterly irresponsible members of the office. Thus the real government of the colony has been entirely dissevered from the slight nominal responsibility which exists. Apart even from this great and primary evil of the system, the pressure of multifarious business thus thrown on the Colonial Office, and the repeated changes of its ostensible directors, have produced disorders in the management of public business which have occasioned serious mischief and very great irritation."

When the political convulsion, that culminated in 1837 in an armed rebellion, aroused in England exceptional public interest in Canadian affairs, attention at last was given to the nature of the Instructions which it had been the practice of the Colonial Office to give to former Governors, and it was at once apparent that these were in many respects obsolete and had been superseded by statutes of the Parliament of Great Britain and the Provincial Legislatures ; and although, in 1838, Lord Durham was directed to carry out in a general way the instructions previously given to Lord Dalhousie, it was pointed out that in so doing he was to

remember that the old instructions might be found inapplicable to existing conditions, that they ought to be revised, but, under the present conditions of the colony, it was not possible to do so without prejudice to the public welfare. Similar advice was given to Lord Sydenham, but the Royal Instructions were never finally revised or made to conform to the existing constitutional relationship between Canada and the motherland until after much correspondence and discussion between the Secretary of the Colonies and the Canadian Minister of Justice in 1878.

After 1861 no attempt was made to retain in Canada control over appeals to the King in his Privy Council by Royal Instructions. Thereafter the royal prerogative was transferred from the King in Council to the King in Parliament or in his local legislatures.

Prerogative Right of Appeal in Canada

The extent to which the prerogative right of appeal to the King in his Privy Council may be taken away by colonial legislation is a matter of the highest importance in Canada, and touches the very foundation of the constitutional rights of the people. The results which flow from a grant of legislative institutions by the Imperial Parliament upon the royal prerogative, were first considered by the Judicial Committee in 1832, in the case of *Cuvillier* v. *Aylwin* (2 Knapp, p. 72).[1] Here an application for leave to appeal was made to the King in his Privy Council under the following circumstances :

Quebec Appeals

Pursuant to the instructions given to Governor Carleton in 1775, an Ordinance was passed in 1777, which constituted the Governor and Council a Superior Court of civil jurisdiction, for hearing and determining all appeals from the inferior courts of civil jurisdiction within the province, in all cases where the matter in dispute exceeded £10 sterling, and declared that the judgment of the said Court of Appeal should be *final* in all cases where the matter in dispute did not exceed £500 sterling, but in all cases exceeding that amount an appeal shall lie to His Majesty in his Privy Council. By the constitutional Act of 1791, which divided the old province of Quebec into the two new provinces of Upper and Lower Canada, it is provided by Article 34 as follows : " And

[1] *Post*, p. 198.

whereas by an Ordinance passed in the province of Quebec, the Governor and Council of the said province were constituted a Court of Civil Jurisdiction, for hearing and determining appeals in certain cases therein specified, be it further enacted by the authority aforesaid, that the Governor, or Lieutenant-Governor, or Person administering the Government of each of the said provinces respectively, together with such Executive Council as shall be appointed by His Majesty for the affairs of such province, shall be a Court of Civil Jurisdiction within each of the said provinces respectively, for hearing and determining appeals within the same, in the like cases, and in the like manner and form, and subject to such appeal therefrom, as such appeals might before the passing of this Act have been heard and determined by the Governor and Council of the province of Quebec ; *but subject nevertheless to such further or other provisions as may be made in this behalf by any act of the Legislative Council and Assembly of either of the said provinces respectively, assented to by His Majesty, his Heirs or Successors.*"

Pursuant to the powers conferred upon the new Legislature of Lower Canada, an Act was passed in 1793, 34 Geo. III, c. 6, which by section 23 constituted the Governor and Executive Council a Superior Court of Civil Jurisdiction or Provincial Court of Appeal. Section 27 provided that an appeal should lie where the matter in dispute exceeded the sum of £20 sterling, and section 30 enacted that the judgment of the Court of Appeal should be *final* in all cases not exceeding £500 sterling, but in cases exceeding that sum an appeal should lie to His Majesty in his Privy Council providing the security as therein set out was given, *any law, custom, usage to the contrary notwithstanding.*

Section 43 of the same Act contained the following provisions : " Provided always, and it is declared and enacted by the authority aforesaid that nothing herein contained shall be construed in any manner to derogate from the rights of the Crown to erect, constitute, and appoint courts of civil and criminal jurisdiction within this province, and to appoint from time to time the judges and officers thereof as His Majesty, his heirs or successors shall think necessary or proper for the circumstances of this province, *or to derogate from any other right or prerogative of the Crown whatsoever.*"

In *Cuvillier* v. *Aylwin* an application was made to the Judicial Committee of the Privy Council for leave to appeal in a case where the amount involved was less than £500 sterling, the sum required

to entitle the party to an appeal, and the Judicial Committee refused the application on the ground that no prerogative right to grant leave existed when the King, acting with the other branches of the colonial legislature, had declared that there should be no appeal in a case of that character (*post*, p. 198).

In the case of *The Queen* v. *Eduljee Byramjee*, in 1846, reported 3 Moo. Ind. App., p. 468, an Imperial Statute authorised the issue of the charter of Bombay. This charter established a Supreme Court of Judicature and provided that this Court might *allow* or *deny* an appeal in criminal cases. Another clause of the charter reserved to the King in his Privy Council the right to refuse or admit an appeal from the Supreme Court. The question arose as to whether this power to grant an appeal applied to criminal as well as civil cases, and in pronouncing judgment the Committee says: "It may be argued that the Crown could not, even by charter, part with its prerogative, but it must be recollected that this is a case in which the Crown grants a charter by virtue of an Act of Parliament, and that charter must be considered as granted in the execution of the powers which were granted by that Act of Parliament." The judgment cites *Cuvillier* v. *Aylwin*. The language of the judgment above is quoted, and the Committee proceeded to say: "It was therefore *held* [in *Cuvillier* v. *Aylwin*] that though there was a reservation of the right of the Crown, yet as the Act in Canada was made in pursuance of an Act of Parliament of Great Britain, the powers contained in that Act did take away the prerogative of the Crown."

In the case of the *Queen* v. *Stevenson* in 1847, reported also in 3 Moo. Ind. App., p. 488, and which was also an appeal in a criminal case, Lord Brougham, speaking for the Committee and dealing with the same Bombay charter, holds that the discretionary powers vested in the Supreme Court to allow or deny an appeal was an express renunciation by the Crown of its right to grant leave to appeal, and he controverts a note of Peere Williams to the case of *Christian* v. *Corren*, in which it is said that "even if there be express words in the charter excluding the right of the subject, these words shall not be held to deprive the subject of his common law right of appeal to the Crown, in order that justice may not fail"; and he further says: "The Crown may abandon a prerogative, however high and essential to public justice and valuable to the subject, if it is authorised by statute to abandon it; and here it is in the execution of a power conferred by statute, that this abandonment, if any abandonment has been made, has taken place." It

is clear, therefore, if the law respecting the Royal Prerogative is correctly stated in these cases, that where the colonial legislature has had conferred upon it the right, and exercises it, to legislate with respect to appeals to the King in Council, the royal prerogative right of granting leave to appeal in such cases no longer subsists.

How far, then, has this case been impeached? The first criticism of it is to be found in the report of the case of *Louis Marois*, 15 Moo., P.C. 189.[1] Here the Committee stated that section 43 of the Colonial Act above mentioned, which preserved the prerogative of the Crown, had not been referred to, and the report says that "their Lordships must not be considered as intimating any opinion whether this decision can be sustained or not, but they desire not to be precluded by it from a further consideration of the serious and important question which it involves."

This criticism of *Cuvillier* v. *Aylwin* was scarcely warranted, because the head note of the report refers to section 43 of the Colonial Act which saved the rights and prerogatives of the Crown, and this section is also referred to in the argument of counsel on p. 78. In addition to this the existence of a clause preserving the royal prerogative in the Act of Lower Canada is expressly referred to and forms the basis of the judgments in the two cases from India above cited.

Cuvillier v. *Aylwin* was reviewed in *Cushing* v. *Dupuy* (5 App. Cas., 409).[2] In that case a Dominion Act provided that in insolvency cases, the judgment delivered by the Provincial Court should be final. A party dissatisfied with the judgment of the Court of Queen's Bench of the Province of Quebec, first applied to that Court for leave to appeal, which was refused, on the ground that under the Insolvency Act its judgment was final. The appellant then presented a petition to His Majesty for special leave to appeal, and the question for determination was whether the power of the Crown by virtue of its prerogative to admit an appeal, was affected by the Dominion legislation. Discussing the earlier question, the Committee, referring to *Cuvillier* v. *Aylwin*, says, "in that case no allusion was made to the principle that express words are necessary to take away the prerogative rights of the Crown, nor to the provision contained in the statute itself that nothing therein contained shall derogate from any right or pre-

[1] *Post*, p. 202. [2] *Post*, p. 198.

rogative of the Crown. This case, however, if not expressly overruled, has not been followed, and later decisions are opposed to it." The judgment concludes by holding that "as it [the legislation] contains no words which purport to derogate from the prerogative of the Queen, to allow, as an act of grace, appeals from the Court of Queen's Bench in matters of insolvency, her authority in that respect is unaffected by it."

It is apparent therefore that the ground upon which the judgment in *Cuvillier* v. *Aylwin* is criticised, is not the principle of law that the prerogative of the Crown to grant leave to appeal may be taken away by appropriate colonial legislation, but solely on the ground that to do so there must be *an express provision in the statute taking away the prerogative right.*

It would follow therefore from this review of the decisions, that in the present provinces of Ontario and Quebec, formerly Upper and Lower Canada, the provincial legislatures under the Constitutional Act of 1791 have power to limit appeals to His Majesty in Council, and where the right of appeal is taken away by such legislation there remains no power in the Judicial Committee to grant leave to appeal.

The course of legislation in the province of Quebec indicates a failure to appreciate the significance of the language used in the old Act of Lower Canada, 34 Geo. III, c. 6, which by declaring the judgment of the Court of Appeal to be *final* where the amount involved was under the appealable amount, had prevented the Crown from granting leave as a matter of prerogative right. The King, according to the theory of English law, has supreme power, legislative and judicial, except where he has deprived himself thereof by legislating as one branch of his legislature. When the Parliament of Canada, which by 3 & 4 Vict.. c. 35 (1840), had had conferred upon it the legislative power formerly exercised by the old provinces of Lower and Upper Canada, in 1861, codified the procedure of the Courts of Lower Canada, the provision with respect to appeals to the King in his Privy Council, which had been carried in the same language substantially into the Consolidated Statutes of the province as it was in 34 Geo. III, c. 6, was changed in a very vital particular.

The provision making the judgment of the Court of Appeal *final*, was dropped, and only that portion which gave a right of appeal to the Privy Council was retained. Accordingly the prerogative right to grant leave, revived. The present provision for

appeals to the King in Council is contained in the Code of Civil Procedure, and reads as follows :

> " Art. 68 (as amended by 8 Edw. VII, c. 75, s. 1). An appeal lies to His Majesty in his Privy Council from final judgments rendered in appeal by the Court of King's Bench :
>
> " 1. In all cases where the matter in dispute relates to any fee of office, duty, rent, revenue or any sum of money payable to His Majesty.
>
> " 2. In cases concerning titles to lands or tenements, annual rents, or other matters by which the rights in future of the parties may be affected.
>
> " 3. In every other case where the amount or value of the thing demanded exceeds five thousand dollars."

The further history of section 43, which preserved the royal prerogative, and to which so much importance was attached *in re* Marois, above mentioned, is curious. Unaware, apparently, of its significance, in the revision of the statutes in 1888, it was tacked on to Article 2463, dealing with Courts of Oyer and Terminer, and in this obscure place is still to be found in the Revised Statutes of Quebec (1909), Article 3338.

The view hereinbefore urged with respect to the legislative power of the province is confirmed by the decision in *The Quebec Fire Insurance Company* v. *Anderson*, 13 Moo. P.C. 477 (1860). In this case a motion was made to quash an appeal from the Court of Appeal of Lower Canada, where leave had previously been granted *ex parte*. It was shown that the case did not fall under any of the conditions giving a right of appeal in the Act of 34 Geo. III, c. 6. It was argued that any local legislation could not deprive the Crown of the prerogative right to grant leave, and that the power had been delegated to the Judicial Committee by 3 & 4 Will. IV, c. 41, which, it was contended, reserved the right of the Crown to admit an appeal, irrespective of any local Act or colonial legislation restricting the same ; but the Committee discharged the order granting leave, saying their Lordships are of opinion that the same does not exceed £500 sterling, the amount required by the Lower Canada Act, 34 Geo. III, c. 6, s. 30, as the appealable value, and proceeded to say : " We think, moreover, that there is no general principle involved in the case, bringing it within the scope of the latter part of the section," which it will be remembered, gives an appeal where the amount involved is under £500 sterling in a case where the matter relates to annual rents, &c., or any such like demand of *a general and public* nature, affecting future rights.

In two later cases, the Judicial Committee has assumed it had power to grant leave to appeal from the Court of Appeal, although they did not in fact do so. In *Goldring* v. *La Banque d'Hochelaga*, 5 App. Cas. 391, and in *Allen* v. *Pratt*, 13 App. Cas. 780, which were motions to quash appeals from the Court of Queen's Bench on the ground that the amount involved was not sufficient to confer jurisdiction, the Committee indicate that in its opinion they had the power so to do. These cases, however, do not impugn the proposition above stated, because, as has been pointed out, the legislature of Quebec has dropped from its statute the old provision that its judgments should be final; but if this were re-enacted there would appear to be no doubt it would deprive the Judicial Committee of the power to grant leave to appeal in cases where the provincial Act declared no appeal should lie.

Ontario Appeals

The course of legislation in Upper Canada pursuant to the powers conferred by the Constitutional Act, was similar in some respects to that in the sister province. In 1794, by 34 Geo. III, c. 2, s. 33, it was provided that the Governor, Lieutenant-Governor, &c., together with any two or more members of the Executive Council of the province, should constitute a Court of Appeal, and by section 35 it was provided that an appeal should lie to this Court from the Court of King's Bench. Section 36 provided that the judgment of the Court of Appeal should *be final* in all cases where the matter in controversy should not exceed £500 sterling, but in cases exceeding that amount, and in cases where the matter in question related to any annual or other rent, customary or other duty, or fee, or any other such like demand of a general and public nature, affecting future rights of what value and amount soever, an appeal should lie to His Majesty in his Privy Council upon proper security being given as therein set out. In 1849, by 12 Vict., c. 63, s. 37, the Court of Appeal consisting of the Governor in Council was abolished and replaced by a new Court of Error and Appeal composed of all the judges of the Court of King's Bench, Common Pleas, and Chancery; and by section 46 it is enacted that the judgments of the Court of Error and Appeal should be final in cases where the matter in controversy did not exceed £1000 sterling, but in cases exceeding that amount, as well as in certain other specified cases, an appeal should lie to His Majesty the King in his Privy Council. This provision was carried into

the Consolidated Statutes of Upper Canada as c. 13, ss. 57–62, and now appears in the recent revision 10 Edw. VII, c. 24 as amended by 2 Geo. V, c. 18, as follows.

"1. This Act may be cited as 'The Privy Council Appeals Act.'

"2. Where the matter in controversy in any case exceeds the sum or value of $4000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights of what value or amount soever the same may be, an appeal shall lie to His Majesty in his Privy Council, and except as aforesaid no appeal shall lie to His Majesty in his Privy Council.

"3. No such appeal shall be allowed until the appellant has given security in $2000 to the satisfaction of the Court appealed from that he will effectually prosecute the appeal and pay such costs and damages as may be awarded in case the judgment appealed from is confirmed.

"4. Subject to Rules of Court, upon the perfecting of such security, execution shall be stayed in the original cause."

It will be perceived that in Ontario the provision of the earlier Acts declaring the judgments of the Court of Appeal to be final is retained, and the legislation is not open to the criticism above made with respect to the province of Quebec.

In *Cushing* v. *Dupuy* (5 App. Cas. 409) the Judicial Committee held that the use of the word "final" in a clause of a statute is not effective to take away the prerogative right of appeal, and that precise words must be used for that purpose. This observation, which is discussed elsewhere, would therefore make it desirable that in provincial legislation it should be expressly provided that the judgment of the Court of Appeal should be final, "*any law, usage, custom or prerogative to the contrary notwithstanding*," which is substantially the language used in 34 Geo. III, c. 6, s. 31.

In the case of *Gillett* v. *Lumsden* (1905, A. C. p. 601) the Committee appears to have been of the opinion that the language of the Ontario Act at present was sufficient to prevent leave to appeal being granted in a case which is not within the appealable amount. In that case the Court of Appeal in allowing the security had inserted a clause that "this order should not prejudice the right of the respondent to object to the competence of the said appeal," and the Committee in refusing to hear the appeal say: "Having regard to the consequences that would follow from admitting an appeal, their Lordships think it is essential that the

appeal should be admitted by the Court [below], and that the Court be bound to exercise its judgment in considering whether any particular case is appealable or not"; but in a very recent case, that of the *Windsor, Essex and Lake Shore Co.* v. *Nelles*, leave to appeal was granted on the 12th August 1913 not only from a judgment of the Supreme Court of Canada, but also from two judgments in the same case of the Court of Appeal. No question of jurisdiction, however, appears to have been raised; but if the argument presented above is sound, the Judicial Committee exceeded its powers in so doing.[1]

Prerogative Right of Appeal in other Provinces

The jurisdiction of the King in his Privy Council to review judgments of colonial courts, other than the final Court of Appeal where such court existed in the colonies, was never claimed as a matter of royal prerogative prior to the Imperial Statute 7 & 8 Vict., c. 69 (1844). Lord Brougham so states in the case *re* Samuel Cambridge (3 Moo. P.C. 175). In that case judgment had been pronounced by the Supreme Court of the province of Prince Edward Island. The Royal Instructions given to the Governor of the island directed him to allow an appeal to himself in Council where the sum in appeal amounted to £300 sterling, with a further appeal to the King in Council where the value amounted to £500 sterling. The judgment in that case only involved £135, and therefore it was not appealable, under the Instructions, either to the Governor in Council or to Her Majesty. In refusing the application, Lord Brougham said: "There is no instance of allowing an appeal from the Supreme Court at once to the Queen in Council, there being by the constitution of the island a Court of Appeal, viz. the Governor and Council, from whose decision alone such an appeal lies. The proper and the only course their Lordships can take is to advise Her Majesty to allow the case to be appealed to the Governor in Council. It may then be brought before us in a future stage, if the parties are not satisfied with the decision." Indeed as early as 1674, Vaughan, Chief Justice, says (Vaug. Rep. 408), "that writs of error in all Dominions belonging to England lie upon the ultimate judgments there given."

Lord Brougham in 1844 introduced the bill which is now to be found as 7 & 8 Vict., c. 69. What the conditions were which it was

[1] *Vide* Addenda et Corrigenda.

desired and intended to remove is shown by the preamble which says: "Whereas by the laws now in force in certain of Her Majesty's colonies and possessions abroad no appeals can be brought to Her Majesty in Council for the reversal of the judgments, sentences, decrees, and orders of any courts of justice within such colonies *save only of the Courts of Error or Courts of Appeal* within the same, and it is expedient that Her Majesty in Council should be authorised to provide for the admission of appeals from *other courts* of justice within such colonies or possessions:

> "1. It shall be competent to Her Majesty, by any order or orders to be from time to time for that purpose made with the advice of her Privy Council, to provide for the admission of any appeal or appeals to Her Majesty in Council from the judgments, sentences, decrees or orders of any court of justice within any British colony or possession abroad, *although such court shall not be a Court of Error or a Court of Appeal within such* colony or possession; and it shall also be competent to Her Majesty, by any such order or orders as aforesaid to make all such provisions as to Her Majesty in Council shall seem meet for the instituting and prosecuting any such appeals, and for carrying into effect any such decisions or sentences as Her Majesty in Council shall pronounce thereon."

The legislation was clearly intended to provide a remedy for such cases as *re Cambridge*.

It has recently been claimed (Keith, *Responsible Government*, p. 1357) that this statute also confers upon the Judicial Committee power to grant leave to appeal from Courts of Appeal where they exist in the colonies, but the language of the statute, viewed in the light of the conditions which then prevailed throughout the British colonies, does not support such a construction. When this statute was passed, the Royal Instructions to every British Governor, without exception, conferred upon him and his Executive Council judicial functions as a Court of Error and Appeal, and made ample provision for a further appeal to the King in his Privy Council. The statute never contemplated interfering with the power to regulate appeals from the Courts of Appeal in the provinces of Upper and Lower Canada, given them by the Constitutional Act of 1791. This undoubtedly was the view of the Imperial authorities in passing the earlier Orders in Council which provided for the institution and prosecution of appeals in the Canadian provinces which had no Courts of Error and Appeal other than the Governor in Council, and which Orders are clearly supplementary to the provisions of Statute 7 & 8 Vict., c. 69. The preamble to the Orders in Council, providing

for appeals from New Brunswick in 1852, and Nova Scotia in 1863, recites the language of 7 & 8 Vict., c. 69, and proceed :

> "And whereas it is expedient that provision should be made in pursuance of the said cited enactments to enable parties to appeal in civil causes from the decision of the Supreme Court of the province to His Majesty in Council, *the same not being a Court of Error and Appeal.*"

Since the Imperial Act 7 & 8 Vict., c. 69, was passed, power to review decisions of the colonial Courts is frequently expressed in the widest terms. In the case of *Falkland Islands* v. *The Queen* (1 Moo. P.C.C. (N.S.) 299, the Committee says : " It may be assumed that the Queen has authority by virtue of her prerogative to revise the decisions of all the colonial courts whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority."

It is an interesting question, whether the constitutional powers given to the provincial legislatures of Canada, by the Colonial Laws Validity Act, 1865 (28 & 29 Vict., s. 63), and the B.N.A. Act of 1867 have not conferred power upon all the provinces to legislate so as to deprive the Crown of its prerogative right to grant appeals from provincial courts of justice.

The Judicial Committee said in *Keeley* v. *Carson* (4 Moo. P.C. 63, 1841), that his commission authorised the Governor of Newfoundland in Council from time to time to summon and call general assemblies of freeholders and householders according to his general instructions, and that the persons so elected should be declared to be the general assembly, and that the Governor, with the advice and consent of the council and assembly, should have full power to make laws for peace, welfare, and good government. The Committee pointed out that neither the commission nor the instructions granted any of the privileges of the British Parliament, and as the statute law on the subject was silent, the common law governed, which was that no powers were given the assembly except such as were necessary to the existence of such a body, and to the proper exercise of the functions which it was intended to execute. With respect to the argument that the assembly had the powers belonging to the House of Commons in England, the Committee says : " The reason why the House of Commons had certain powers was not because it was a representative body with legislative functions, but by virtue of ancient usage and prescription, *the lex et consuetudo parliamenti*, which forms

part of the common law of the land, and this the colonial assembly never had. The Committee therefore held that the legislature of Newfoundland did not possess the power to arrest with the view of adjudicating on a contempt committed outside the House.

This decision was followed in *Fenton* v. *Hampton* (2 Moo. 347, 1858). Subsequent to these cases, in 1865, the Imperial Parliament passed the Colonial Laws Validity Act (28 & 29 Vict, c. 63), which, amongst other things, provided by section 5, that "every colonial legislature shall have and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature and to abolish and re-constitute the same and alter the constitution thereof, and to make provision for the administration of justice." The B.N.A. Act of 1867, by section 92, provided that "in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:

> "1. The amendment from time to time nothwithstanding anything in this Act of the constitution of the province except as regards the office of Lieutenant-Governor.
>
> . . . . . .
>
> "14. The administration of justice in the province, including the constitution, maintenance and organisation of provincial courts, both of civil and criminal jurisdiction and including procedure in civil matters in these courts."

In *Fielding* v. *Thomas* (1896, A. C. 600),[1] it was held that the limited legislative jurisdiction given to the provincial legislatures by the original constitution had been enlarged by the above Acts, and that the Assembly had power to arrest a person outside the House for disobeying an order, which summoned him to appear, to answer for a breach of its privileges.

In *Hodge* v. *The Queen* (9 App. Cas. 117), it is said:[2]

> "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion."

[1] *Post*, p. 506.

[2] *Post*, p. 345.

This statement of the law was affirmed in *re Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick* (1892, A. C. 437), where Lord Watson, referring to the B.N.A. Act, says :[1]

> "The Act places the constitution of all the provinces within the Dominion on the same level, and what is true with respect to the legislature of Ontario, has equal application to the legislature of New Brunswick."

If the Imperial Act (7 & 8 Vict., c. 69) does not apply to provincial Courts of Appeal, there would seem to be no doubt that the legislatures of the provinces of Manitoba, British Columbia and New Brunswick have full power to regulate appeals from the Courts of Appeal in these provinces to the Privy Council, and deprive the King of his power to grant leave to appeal.

The fact that recently Imperial Orders in Council have been passed, regulating appeals from the Courts of Appeal in Manitoba and British Columbia, does not conflict with the construction hereinbefore placed upon 7 & 8 Vict., c. 69, because there can be no doubt, in the absence of provincial or imperial legislation, that the King in his Privy Council has power to grant leave to appeal from these courts as part of his royal prerogative.

The further question remains as to the legislative power of the provincial legislatures to limit appeals to the Privy Council from courts which are not courts of appeal. This would, of course, conflict with the express provision of 7 & 8 Vict., c. 69, and the Colonial Laws Validity Act, no doubt, does provide by section 2 that any colonial law repugnant to the provisions of an Imperial Act of Parliament, should be void to the extent of such repugnancy. But the question is, does the extended jurisdictional powers at present enjoyed with respect to the constitution and organisation of courts of justice in the provinces under the B.N.A. Act, impliedly confer power to regulate appeals to the Privy Council ?

This legislative power has been exercised in the province of Quebec, and the legislation never questioned. In 1874, by 37 Vict., it was enacted as follows :—

> "1. No person who shall have inscribed in review before three judges, any cause in the Circuit Court susceptible of appeal to the Court of Queen's Bench, or any cause in the Superior Court, and shall on such inscription have proceeded to judgment, shall be entitled to appeal to the Court of Queen's Bench from the judgment of the Superior Court sitting in review, if such judgment confirms that rendered in the first instance.

[1] *Post*, p. 418.

"2. Causes adjudicated upon in review, which are susceptible of appeal to Her Majesty in her Privy Council, but the appeal whereof to the Court of Queen's Bench is taken away by this Act, may nevertheless be appealed to Her Majesty by observing the same formalities and provisions and subject to the same conditions as in the case of judgments rendered by the Court of Queen's Bench (appeal side), and with the same effect as if every provision of law, in relation to appeals to Her Majesty from judgments of the Court of Queen's Bench, was anew enacted with respect to the Superior Court sitting in review, its officers or their office."

In the province of Quebec three Superior Court judges, sitting together, have power, under the name of the Court of Review, to hear appeals from certain final judgments of the Superior Court or the Circuit Court. The effect of the above mentioned statute was to provide that where the Court of Review confirmed a judgment of the Court below, no further appeal should lie to the Court of Queen's Bench, and that cases which, had they been appealable to the Court of Queen's Bench, would have been subject of a further appeal under the provincial statute to the Privy Council, are now by this legislation given such right of appeal.

Many appeals have been taken to the Judicial Committee from the Court of Review under the statute. There has therefore been recognition of the power of the province to legislate respecting the prerogative right of appeal from subordinate Courts to the Privy Council, notwithstanding that the provisions of the Imperial Act (7 & 8 Vict., c. 69), vested in the Judicial Committee the power by Order in Council to regulate such appeals.

The competence of the provincial legislatures to limit appeals to the Privy Council, under their general legislative jurisdiction, is supported by the communications which took place between the Canadian Minister of Justice and the Colonial Secretary respecting the Supreme Court Act in 1876, in view of the fact that the Dominion Parliament and the Provincial Legislatures have equal plenary powers to legislate with regard to the matters respectively assigned to them by the B.N.A. Act. The Supreme Court bill as originally framed provided that the judgment of that Court should be final, but the Crown refused its assent unless the section in question preserved the prerogative right of appeal. The controversy therefore was based on the assumption that the original bill, if it had received the assent of the Crown, would have been valid and effective to prevent the exercise of the royal prerogative. It is to be pointed out also that the Parliament of Canada has

claimed such power by providing in the criminal code (R.S.C. 146, s. 1025) that there should be no appeal in a criminal case to His Majesty in Council, notwithstanding any royal prerogative.

The remarks made by the Lord Chancellor of England at the Colonial Conferences in 1907 and 1911 seem to support the view of the enlarged legislative power vested in the colonies under their recent constitution. In one place the following question was put by Dr. Jameson :—

> "The point I wanted to know about is this question of our depriving ourselves of the right of appeal to the Privy Council. Do I understand we could only do that by Imperial legislation or an Imperial Order in Council ? "
>
> The Lord Chancellor : "You could not do it by Imperial Order in Council because it would be interfering with your own affairs. By the Imperial Parliament it could be done if the colony asked that it should be done—and it would be done. It is rather a novel point. My present impression—and I am sure you will not tie me to it if I am wrong—is that the Parliament of a self-governing colony with the royal assent could regulate that as well as any thing else."
>
> Mr. Deacon : "Is not there power by Order in Council to restrict the conditions of appeal ? "
>
> The Lord Chancellor : "When the constitution is set up the King has no power whatever to interfere with or derogate from it."

The Desirability of Limiting Appeals

The Act 7 & 8 Vict., c. 69, undoubtedly has added vastly to the prerogative right of appeal. The legislation was introduced by Lord Brougham, but the debates in Parliament contain not a word with respect to the sections which dealt with all colonial appeals. As originally drafted, the bill contained provisions which would have conferred upon the Judicial Committee jurisdiction in matrimonial cases ; and the criticisms were entirely with respect to this provision of the bill, along with some attacks on another provision, which it was claimed was intended to make a judicial position for the special advantage of Lord Brougham himself. These features were subsequently dropped. At that time the matter of the Crown's interference with the ordinary and regular administration of justice by the established judicial tribunals of the colony was not a matter of serious import, but to-day, with colonies almost imperial in their size and population, with courts modelled upon those of Great Britain, and a system of judicature that provides

for a number of appeals between the trial of an action and its determination by the highest court of last resort in the province or state, it is impossible to suggest any good reason why litigants should have the privilege of carrying their cases to the Judicial Committee from lower courts, without exhausting the opportunity of obtaining a review in the provincial courts. No such privilege is afforded under the English Judicature Act, and no litigant can reach the House of Lords until his case has first been disposed of by the Court of Appeal. A standard authority says : " An appeal will not lie to the House of Lords from any tribunal of inferior jurisdiction, until all the intermediate stages have been passed. In other words, an appeal *per saltum* is *not* allowed. The rule being that all lower remedies must be tried, and exhausted, before an appeal will be received in the House of Lords." [1]

The present Lord Chancellor of England, during the debate on the Australian Commonwealth Bill, said that he understood the colonial view to be, that what in the shape of a court of appeal (in England) was good enough for the people of Great Britain was quite good enough for the colonies, and what was not good enough for the people of Great Britain was not good enough for the colonial litigants.

In all the self-governing colonies the courts of justice have the confidence of the people. The colonial spirit is extremely sensitive of any external interference in matters which pertain to the widest exercise of the powers of self-government. That there should be an appeal from the highest courts in the colonies to a tribunal composed of the most distinguished jurists of England, no one will question, but the imperial bond will not be strengthened by discrediting colonial courts of appeal, in permitting litigants to carry their cases *per saltum* from courts of first instance, to the foot of the throne.

This question was discussed at considerable length at the Colonial Conferences in 1907 and 1911, particularly with respect to the establishment of a new Court of Appeal for South Africa. One of the paragraphs in the memorandum presented by the representatives for that colony read as follows :

> " If a court of appeal is established, it is considered most desirable that this right of appeal to the Privy Council should be taken away so as to prevent the litigant dissatisfied with a decision of the

[1] Macqueen, *House of Lords Practice*, p. 106.

Supreme Court of a colony passing by the Court of Appeal and prosecuting his appeal from such decision before the Judicial Committee of the Privy Council."

This clause received the unanimous support of the Conference, and the following finding was made :

"1. When a Court of Appeal has been established for any group of colonies, geographically connected, whether federated or not, to which appeals lie from the decisions of the Supreme Court of such colonies, it should be competent for the legislature of each such colony to abolish any existing right of appeal from its Supreme Court to the Judicial Committee of the Privy Council.

"2. That the decision of such Court of Appeal shall be final, but leave to appeal from such decisions may be granted by the said court in certain cases prescribed by the statute under which it is established.

"3. That the right of any person to apply to the Judicial Committee of the Privy Council for leave to appeal to it from the decisions of such *Court of Appeal* shall not be curtailed."

In the Act constituting the confederation of South Africa, this provision was incorporated, and now no appeal lies to the Judicial Committee from that colony by special leave or otherwise, except from the Court of Appeal.[1] Similar legislation should be passed applicable to all self-governing colonies, and if requested, no doubt, would be granted. In the recent Orders in Council which have been passed providing for appeals from the various provinces of Canada having no Court of Appeal, to the King in Council, a right of appeal is given, not only from the Supreme Court of the province, which by the Interpretation Act includes any judge of the Court, to the Privy Council, where the amount involved exceeds a specific sum ; but an appeal is also given by leave of the Court from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court the question involved is one which, by reason of its great general and public importance, ought to be submitted to His Majesty in Council for decision. In all these provinces an appeal lies to the Supreme Court of Canada. Such an unlimited right of appeal is open to all the objections above-

[1] South Africa Act (1909, 9 Edw. VII, c. 9): "There shall be no appeal from the Supreme Court of South Africa or from any division thereof to the King in Council, but nothing herein contained shall be construed to impair any right which the King in Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King in Council. Parliament may make laws limiting the matters in respect of which such special leave will be asked, but bills containing any such limitation shall be reserved by the Governor-General for the signification of His Majesty's pleasure."

named, and there is much force in the contention made at the Conference by Sir Wilfrid Laurier, that this power conferred upon the colonial judges is altogether too extensive, and that it would be better that the leave, if it be granted at all, should be controlled by some other than judicial authority.

Imperial Orders in Council

The right of appeal to the King in Council, in the provinces of Ontario and Quebec alone, rests upon Provincial Statutes. In all other provinces, the right is based upon Imperial Orders in Council. One of the resolutions adopted at the Colonial Conference, in 1907, was the following : [1]

> "This Conference, recognising the importance to all parts of the Empire of the appellate jurisdiction of His Majesty the King in Council, desires to place upon record its opinion :
>
> "1. That, in the interests of His Majesty's subjects beyond the sea, it is expedient that the practice and procedure of the Right Honourable the Lords of the Judicial Committee of the Privy Council be definitely laid down in the form of a code of rules and regulations.
>
> "2. That in the codification of the rules, regard should be had to the necessity for the removal of anachronisms and anomalies, the possibility of the curtailment of expense, and the desirability of the establishment of courses of procedure which would minimise delays.
>
> "3. That, with a view to the extension of uniform rights of appeal to colonial subjects of His Majesty, the various Orders in Council, Instructions to Governors, Charters of Justice, Ordinances and Proclamations upon the subject of the Appellate Jurisdiction of the Sovereign should be taken into consideration for the purpose of determining the desirability of equalising the conditions which gave right of appeal to His Majesty.
>
> "4. That much uncertainty, expense and delay would be avoided if some portion of His Majesty's prerogative to grant special leave to appeal, in cases where there exists no right of appeal, were exercised under definite rules and restrictions."

Pursuant to these resolutions, communications passed between the Colonial Office and the Government of Canada, with the object of obtaining the assent of the different provinces, as well as the

[1] Colonial Conference, 1907, Minutes of Proceedings, published by the King's Printer of Canada.

Dominion, to the issue of Imperial Orders in Council providing for appeals to the King in Council according to a standard form. After correspondence extending over a number of years, the consent of all the provinces of Canada was obtained, except from Ontario and Quebec. The Dominion Government also refused its approval. The form submitted to the Government of Canada did not attempt to confer a right of appeal as it did in the forms submitted to the provinces, but only simplified the practice, and was not, in fact, objectionable, as its clauses were substantially the same as those of the new rules of practice promulgated by the Judicial Committee in 1907, and which applied to appeals from all the colonies of the Empire. Ontario and Quebec wisely refused, as the acceptance of an Imperial Order in Council would have been a recognition of the right of the King in Council to interfere with their constitutional right to regulate appeals to the Privy Council (*ante*, p. 25).

In some of the other provinces new Orders in Council were very necessary. In Manitoba and British Columbia the old orders were inapplicable as soon as courts of appeal were established, as they gave a right of appeal in Manitoba from the Court of King's Bench and in British Columbia from the Supreme Court of that province. All the Orders in Council previously passed, granting a right of appeal to the King in Council, provided that the right so given should not be construed as taking away the prerogative right to admit an appeal to the King in Council, from any judgment of the same court. The absence of this reservation does not in itself preclude the exercise of the royal prerogative, although it may have been omitted in view of the resolution introduced by South Africa at the Colonial Conference (1907), which said "that much uncertainty, expense and delay would be avoided if some portion of His Majesty's prerogative to grant leave to appeal in cases where there exists no right of appeal were, under different rules and instructions, delegated to the discretion of the local courts." [1]

Comparison of Right of Appeal in Quebec and Ontario

It will appear from the language used in the Provincial Statutes (*ante*, pp. 30, 32), that the limitation placed upon the right of appeal differs in the provinces of Quebec and Ontario, and as the language

[1] The Orders in Council for the provinces of Canada are set out in full in Appendix I hereto.

conferring the right has been interpreted in some of the decisions of the Supreme Court, the difference has become of some importance. In the instructions to Lord Dorchester the appeal is given where the matter in question exceeded £500 sterling, and also, "where the matter in question relates to the taking or demanding of any duty payable to Us, or to any fee of office or annual rents or such like matter or thing where the right in future may be bound." When the legislature of Lower Canada proceeded to incorporate this provision into its statute (34 Geo. III, 30), the language used was "where the matter in dispute exceeds £500 sterling or the matter in question shall relate to any fee of office, duty, rent, revenue or any sum or sums of money payable to His Majesty, *titles to land or tenements*, annual rents or such like matters or things where the rights in future may bound." The compilers of the Civil Code of Lower Canada used the following language: "Where the matter in dispute exceeds the sum or value of £500 sterling, and in all cases where the matter in dispute relates to any fee of office, duty, rents, revenue or any sum of money payable to His Majesty, and in cases concerning titles to lands or tenements, annual rents or other matters by which the rights in future of the parties may be affected." The code as at present in force reads as follows:—

> "1. In all cases where the matter in dispute relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty.
>
> "2. In cases concerning titles to lands or tenements, annual rents, or other matters by which the rights in future of the parties may be affected.
>
> "3. In every other case where the amount or value of the thing demanded exceeds five thousand dollars."

In Upper Canada, the legislature, in embodying the provisions for appeal in force only under the Instructions to Lord Dorchester, used the following language, 34 Geo. III, c. 2:

> "That the judgment of the said Court of Appeal shall be final in all cases where the matter in controversy shall not exceed the sum or value of £500 sterling, but in cases exceeding that amount as well as in all cases where the matter in question shall relate to the taking of any annual or other rent, customary or other duty or fee, or any such like demand of a general and public nature, affecting future rights of what value or amount soever, an appeal may lie to His Majesty in his Privy Council, upon proper security, etc."

This language was reproduced in the statute constituting the new Court of Error and Appeal (12 Vict., c. 63). It appears in substantially the same language, except that the amount involved is fixed at $4000 in the Consolidated Statutes of Upper Canada and in the Revision of the Statutes of Ontario, 1897, c. 48. The provision for an appeal to the Privy Council (now in force, 10 Edw. V., c. 24) reads as follows :

> " Where the matter in controversy in any case exceeds the sum or value of $4000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to Her Majesty in her Privy Council, and, except as aforesaid, no appeal shall lie to Her Majesty in her Privy Council."

To summarise the above, it will be perceived that the right of appeal is more extensive in the province of Quebec than in the province of Ontario ; that whereas in Quebec an appeal is given, however small the amount involved, if it relates to " fee of office," in Ontario the expression is " fee " ; and that where in Quebec the word " duty " is used, in Ontario the expression is " customary or other duty " ; that whereas in Quebec the words are " rent, revenue, or any sum payable to His Majesty," in Ontario it is " any annual or other rent " ; that in Quebec an appeal is given " where titles to lands or tenements, annual rents or other matters by which the rights in future of the parties may be affected," in Ontario there is no appeal in question of titles to lands or tenements, and the future rights which give an appeal are only those which affect a demand of a general or public nature of a like character to annual or other rents or a customary or other duty or fee. An appeal lies to the Supreme Court of Canada from judgments rendered in the Province of Quebec, " where the matter relates to any fee of office, duty, rent, revenue or any sum of money payable to His Majesty or to any title to lands or tenements, annual rents or other matters or things where rights in future may be bound." This is substantially the same provision as we have in article 68, providing for appeals from Quebec to the Privy Council, except that the entire clause in the latter case is split up into two parts. The Supreme Court of Canada has held, in interpreting the provisions for appeals to the Supreme Court from the province of Quebec, that the words " where rights in future may be bound "

applies to all the matters mentioned in the section—in other words, it is not every case involving a fee of office, duty, &c., that is appealable, but only those in which future rights are affected (*Bank of Toronto* v. *Les Curé, &c.*, 12 S.C.R. 25), but this interpretation, owing to the splitting up of the section, will probably not apply to appeals from the province of Quebec to the Privy Council. The Supreme Court also held that the words "fee of office" did not apply to a position of schoolmistress (*Larivierère* v. *Three Rivers*, 23 S.C.R. 723). It also held that the words "customary or other duty or fee" in the Ontario Statutes did not apply to the fee which a party was required to pay for the privilege of entering a private park (*Grimsby Park Co.* v. *Irving*, 41 S.C.R. 35). It also held that a by-law providing for a special water rate to be paid by certain industries did not bring in question "the taking of an annual or other rent, customary or other duty or fee." The Supreme Court of Canada has held that the words "annual rents" mean *rentes foncières* (ground rents), and not an annuity, or any other like charges or obligations (*Rodier* v. *Lapierre*, 21 S.C.R. 69). It has also held that the words "such like matters or things where the rights in future may be bound" are governed by the preceding words, on the principle of *noscitur e sociis*, and that the "future rights to be bound" must relate to some or one of the matters or things previously specified in the sub-section, viz. to "fee of office, duty, rent, revenue, or sum of money payable to His Majesty, or to some title to lands or tenements or to some such like matter or thing" (*Gilbert* v. *Gilman*, 16 S.C.R. 189). It has also held that the future rights mentioned do not include such as are merely pecuniary in their nature (*Raphael* v. *McLaren*, 27 S.C.R. 319; *McDonald* v. *Galivan*, 28 S.C.R. 258; *Banque du Peuple* v. *Trottier*, 28 S.C.R. 422). It has held that the words "fee of office, duty, rent, revenue, or any sum of money payable to His Majesty" relate only to claims against the Crown (*Odell* v. *Gregory*, 24 S.C.R. 661).

Constitutional Status of Self-Governing Colonies

With the question of the power to legislate respecting the right of appeal to the Privy Council, there is involved a larger one of the constitutional relationship of the self-governing colonies to the mother country. It has been pointed out previously (*ante*, p. 3), what steps were at first taken by the Imperial Government to retain

control over all the local institutions of the colony, and how it was only as the result of a long and persistent struggle carried on for nearly a century that responsible government was obtained. This still, however, left a large field of control to the Home Government. Certain Imperial Statutes established the right of the Parliament of Great Britain to legislate for the colonies, and declared all laws repugnant to Imperial Statutes null and void. The provisions of sections 55, 56, and 57 of the B.N.A. Act preserve to the Governor-General the right to reserve bills for the King's assent, and also provide that any bill may be disallowed by the King in Council within two years. These provisions for the exercise of supremacy over colonial legislation have become a matter largely of academic interest, by reason of the change in the colonial status which has been quietly accomplished during recent years. The Colonial Conference of 1907, which became the Imperial Conference of 1911, has brought about a change in the relations between the colonies and the Imperial Government, as revolutionary in its character and as far-reaching in its results, from a colonial standpoint, as that which the revolution of 1688 accomplished when the supremacy of the British Parliament over the Crown in the Government of Great Britain was finally established.

The relationship of the colonies to the mother country is only partially governed by statutory enactments. Our constitution like that of England, is for the most part unwritten, and is constantly the subject of further development. Every decade in the past has shown some larger rights demanded, and conceded. There has never been a time of retrogression. Every outpost won has been retained. An advanced conception of colonial rights of self-government was frankly admitted at the above Conferences by those who represented His Majesty's Government, in the discussion of the question of imperial legislation respecting the naturalisation of aliens. It would unquestionably be within the power of the Imperial Parliament to declare that every natural-born British subject (which would include the Indian of Bombay and the negro of West Africa), should have the right to reside and exercise his privileges of citizenship in every part of the Empire. Indeed, such legislation may well be claimed as a necessity for the continued existence of the Empire itself, but no such claim was made. On the contrary, at the meeting of the Conference on 19th June 1911, Earl Crewe, Secretary of State for India, made an appeal to the representatives of the Colonies to deal with the

question of Indian immigration in a sympathetic spirit. He said :

" He desired to refer generally to the question of Indian emigration and immigration. He had had the advantage or disadvantage of considering the question from two different standpoints ; first as Colonial Secretary, and secondly as Secretary of State for India. In both offices he had come to the conclusion that no question could be discussed at the Conference which was more difficult, and in some of its aspects more critical, than that of Indian immigration and the treatment of members of native races within the various self-governing Dominions. When Secretary for the Colonies, he had on one occasion expressed the opinion that if there was any question which seemed to threaten not only the well-being but the actual existence of the Empire as an Empire, it was the difficulty between the white and the native races. The question was in one sense insoluble. There could be no complete solution of the difficulty. His Majesty's Government fully recognised that as the Empire is constituted it was impossible to maintain the idea that there could be an absolutely free interchange between all subjects of the Crown. *Nobody could dispute the right of the self-governing Dominions to decide for themselves whom they would admit as citizens of their respective territories*," &c.

The Secretary of State for the Home Department, the Hon. Winston Churchill, speaking on the question of naturalisation of aliens, said (13th June 1911) :

" No Imperial Act on this subject ought to deal with the self-governing Dominions except and only in so far as it was adopted by the Parliaments of these Dominions. There was no idea of overriding local laws ; each Dominion must be the judge as to the conditions under which a certificate of naturalisation could be granted."

On the same date the Solicitor-General, Sir John Simon, said :

" What I suggest the Conference has to remember is that for every one man who is naturalised you have thousands of persons who are natural-born British subjects. Of course our law is that anybody born in any part of the British Empire, whatever his parentage, is a natural-born British subject for all purposes ; and as Mr. Harcourt was pointing out, whatever may happen in the case of a man of colour who in some corner of the Empire gets naturalisation, he cannot be put in a better position than an exactly similar man who was born within the British Empire. The real safeguard which I suggest that the Dominions have is the power which they of course freely exercise as they think right of imposing conditions which apply not only to aliens but apply to British subjects which must be satisfied before those persons in their own area exercise political or other rights."

The Secretary of State for the Colonies, the Hon. L. Harcourt, said (13th June 1911), addressing Sir Joseph Ward :

"You have more than the power of exclusion of aliens left to you ; you have the power of exclusion of British subjects if of a particular colour or a particular race."

Sir Joseph Ward : "That is so. So we are perfectly safe in that particular respect."

Mr. Churchill : "Or any other conditions you may choose to make at any other time by your law."

On another occasion Mr. Churchill said :

"I certainly feel and I am sure my Right Honourable friend, the President of the Conference, agrees with me that no Imperial Act ought on this subject to deal with the self-governing colonies unless and except in so far as it is adopted by their Parliaments.

"Nothing in the proposal we put forward to-day is intended to touch or affect the local law as regards immigration, that is to say, the exclusion of aliens or even natural-born British subjects which the Colonies strongly hold to in some cases, and I think very reasonably in some cases."

Mr. Churchill, again speaking of the inconvenience of the existing naturalisation laws of the Empire, says :

"It would be a great thing if we could remedy these inconveniences, but we shall not remedy the inconveniences of the present system if we depart from sound principles of colonial and imperial government. We must base ourselves in any legislation which we seek upon this subject, upon the two main principles, as I understand them, of the Government of the British Empire. First of all, we must base ourselves upon the assents of local parliaments, and secondly upon the responsibility of ministers. As long as we stand on these two foundations, I do not think that any real difficulties will arise in practice."

Prior to the sittings of the Imperial Conference in 1911, the Prime Minister of South Africa sent a communication through the Governor-General to the Secretary of State, in which he said :

"It is of course true that the British Parliament has sovereign legislative power throughout the Empire, and that legislative authority of the Dominion Parliaments is restricted to their own territorial limits, and that, therefore, a uniform law for the Empire requires the intervention of the Imperial Parliament. At the same time, it would appear to be a grave departure from established practice to pass an imperial measure intimately affecting the Dominions without reference to their own local parliaments. Such a departure may come to be looked upon as a precedent for similar

action in future, and is on that ground likely to rouse suspicion and create difficulties in the Dominions. Ministers, therefore, think that the Bill should make provision that it will not be applied to any self-governing colony without the previous resolutions of both Houses of its Parliament approving of such a step."

The draft bill prepared for the purpose of carrying out the views of the conference with respect to naturalisation provided in section 8 as follows: "Nothing in this Act shall take away or abridge any power vested or exercisable by the legislature or government of any British possession, or prevent any such legislature or government from treating differently different classes of British subjects."

In 1913 the Parliament of South Africa provided, by an Act, for the restriction of immigration into the Union. A prohibited immigrant was declared to be any person, or class of persons, deemed by the Minister on economic grounds, or on account of standard or habits of life, to be unsuited to the requirements of the Union or a province, and provided for the establishment of an immigration board having power to reject immigrants of the prohibited class, and by another section of the Act provided that no court of law in the Union should, except upon a question of law reserved by the board, have jurisdiction to review, quash, or otherwise interfere with any proceeding of the immigration board or its officers.

Conclusions

The status of self-governing colonies has, through its entire history, developed not as a result of statutory enactment, but by the oral and written, often informal admissions or statements of those who for the time being controlled His Majesty's Government.

Responsible government in the provinces of Canada was established, as pointed out, by the action of the Governor-General of Canada and the subsequent communications of the Secretary of State for the Colonies, Earl Grey, to the Lieutenant-Governors of the Provinces of British North America. So the declarations of members of His Majesty's Government at the conferences, with respect to the rights and privileges of the colonial legislatures, are binding upon all future representatives of His Majesty, and must be treated as establishing the constitutional rights of the colony, which will supersede the strictly legal relationship to be deduced from the statutes of former years. It may now be said

that the legislative jurisdiction of a self-governing colony is limited to the ambit of its own territory, but within that sphere it is supreme. It may be confidently asserted that never again will a Canadian Act be disallowed, but legislation which affects imperial interests will only be introduced in the Colonies after its terms have been agreed upon between the colonial and imperial authorities, as is now the well-settled practice. On the other hand, imperial legislation will be limited in colonial matters to such as affect more than one colony, province, or state, and which could not be effectively exercised by any one of them. Such legislation will only be passed by the Imperial Parliament at the request of the colonies interested.

BOOK II

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It is unnecessary for the purpose of this work to consider historically the circumstances which induced the Provinces of Canada, Nova Scotia and New Brunswick, to surrender to a federal

legislature to be established, those functions which were common to all, and which it was conceived might be best exercised by a central authority, while there should be retained to each province the control of such matters as were of a local or private character. At the time of confederation each of the provinces had a system of government modelled upon that of Great Britain. Each had an assembly elected by the people and a legislative council appointed by the Crown. The Governor or Lieutenant-Governor was the executive head, representing the King, and all legislation was enacted in his name with the advice and assent of the legislative Council and Assembly. The purpose of the Confederation Act, in the recital thereto, thus declared : " Whereas the provinces of Canada, Nova Scotia and New Brunswick, have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom," &c. The main constitutional features of the Act are as follows :

Executive Powers (Dominion)

The executive government and authority of and over Canada is declared to continue and be vested in the Queen. The Governor-General acts always with the advice of his Privy Councillors, who are chosen by him.

Legislative Powers (Dominion)

The Parliament of Canada consists of the King and Upper House, styled the Senate, and the House of Commons. The privileges, immunities, and powers of the Senate and House of Commons are to be such as shall be defined by the Parliament of Canada, but not to exceed those of the Commons House of the Parliament of Great Britain, and by legislation of the Parliament of Canada subsequently passed, these privileges, immunities, and powers are declared to be those held and exercised by the Commons House of the Parliament of Great Britain.

Executive Power (Provincial)

The executive head of each province is the Lieutenant-Governor, appointed by the Governor-General in Council under the Great Seal of Canada.

The Lieutenant-Governor acts with the advice of an executive council chosen by him.

Legislative Power (Provincial)

The Legislature of all the provinces except Quebec consists of the Lieutenant-Governor and one House, styled the Legislative Assembly.

Distribution of Legislative Powers

Sections 91 and 92 of the Act assign the field of legislative jurisdiction, between the Dominion Parliament on the one hand and the Provincial Legislatures on the other.

Proprietary Rights

Proprietary rights are disposed of by section 102 and the following sections of the Act (*post*, p. 123). It does not follow that because the Dominion has legislative jurisdiction over a certain subject-matter, that it also has proprietary rights therein. The distinction is clearly made by Lord Herschell in *Attorney-General for Canada* v. *Attorney-General for Ontario* (1898), A. C. 700,[1] where he says:

> "It must also be borne in mind that there is a broad distinction between proprietary and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of the Act possessed by the provinces remain vested in them, except such as are by any of its express enactments transferred to the Dominion of Canada."

The B.N.A. Act covers the Whole Field of Self-Government

The scope of the Act has been recently expressed as follows (*Attorney-General for Ontario* v. *Attorney-General for Canada* (1912), A. C. 571):[2]

> "In 1867 the desire of Canada, for a definite Constitution embracing the entire Dominion, was embodied in the British North America Act. Now there can be no doubt that under this organic

[1] *Post*, p. 550.

[2] *Post*, p. 723.

instrument the powers distributed between the Dominion on the one hand, and the provinces on the other hand, cover the whole area of self-government within the whole area. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively.

"In the interpretation of a completely self-governing Constitution, founded upon a written organic instrument such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarters unless it be extraneous to the statute itself as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act."

The same conception of the Act had previously been expressed at various times by the Judicial Committee.

In the *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575,[1] it is said :

"They adhere to the view which has always been taken by this Committee that the Federation Act exhausts the whole range of legislative power and whatever is not thereby given to the provincial legislatures rests with the parliament."

In *Union Colliery* v. *Bryden* (1899), A. C. 580,[2] Lord Watson said : "The question raised directly concerns the legislative authority of the legislature of British Columbia, which depends upon the construction of sections 91 and 92 of the B.N.A. Act, 1867. These clauses distribute all subjects of legislation within the Parliament of the Dominion and the several legislatures of the provinces."

In *The Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick* (1892), A. C. 437,[3] it is said :

"The object of the Act was neither to weld the provinces into one, nor to subordinate provincial government to a central authority, but to create a federal government, in which they should all

[1] *Post*, p. 378. [2] *Post*, p. 564. [3] *Post*, p. 414.

be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which, by section 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act."

Distribution of Legislative Jurisdiction

The scheme for the distribution of legislative jurisdiction provided by the Act, is to confer authority upon the Parliament of Canada, to legislate upon certain subject-matters by section 91, and corresponding authority is given to the provinces in other subject-matters by section 92.

These sections read as follows:

"91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

1. The public debt and property.
2. The regulation of trade and commerce.
3. The raising of money by any mode or system of taxation.
4. The borrowing of money on the public credit.
5. Postal service.
6. The census and statistics.
7. Militia, military, and naval service and defence.
8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.
9. Beacons, buoys, lighthouses, and Sable Island.
10. Navigation and shipping.

11. Quarantine and the establishment and maintenance of marine hospitals.
12. Sea coast and inland fisheries.
13. Ferries between a province and any British or foreign country or between two provinces.
14. Currency and coinage.
15. Banking, incorporation of banks, and the issue of paper money.
16. Savings banks.
17. Weights and measures.
18. Bills of exchange and promissory notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and insolvency.
22. Patents of invention and discovery.
23. Copyrights.
24. Indians and lands reserved for the Indians.
25. Naturalisation and aliens.
26. Marriage and divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters.
28. The establishment, maintenance, and management of penitentiaries.
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures

"92. In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

1. The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the province, except as regards the office of Lieutenant-Governor.
2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.
3. The borrowing of money on the sole credit of the province.
4. The establishment and tenure of provincial offices, and the appointment and payment of provincial officers.

5. The management and sale of the public lands belonging to the province and of the timber and wood thereon.
6. The establishment, maintenance, and management of public and reformatory prisons in and for the province.
7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals.
8. Municipal institutions in the province.
9. Shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local, or municipal purposes.
10. Local works and undertakings other than such as are of the following classes :
    (*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province.
    (*b*) Lines of steamships between the province and any British or foreign country.
    (*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.
11. The incorporation of companies with provincial objects.
12. The solemnisation of marriage in the province.
13. Property and civil rights in the province.
14. The administration of justice in the province, including the constitution, maintenance, and organisation of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.
15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section.
16. Generally all matters of a merely local or private nature in the province."

Peace, Order, and Good Government

It has been pointed out (*ante*, p. 54) that all powers necessary for colonial self-government are vested in the Parliament of Canada and the Legislatures of the Provinces combined. It would necessarily follow therefore, as the residuum of legislative jurisdiction is vested in the Dominion, after there has been carved out of the entire field the subject-matters enumerated in section 92, that federal jurisdiction is contained in the general words which

empower the Dominion to make laws for the peace, order, and good government of Canada.

In *Russell* v. *The Queen*, 7 App. Cas. 829, it is said :[1]

"It cannot be contended, and, indeed, it was not contended at their Lordships' bar, that if the Canada Temperance Act does not come within one of the classes of the sub-sections assigned to the provincial legislatures, the Parliament of Canada had not, by its general power to make laws for the peace, order, and good government of Canada, full legislative authority to pass it."

Also, in the *Citizens Insurance Company* v. *Parsons* (7 App. Cas. 96),[2] the Committee says :

"The authority of the Dominion Parliament to incorporate companies would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislature being the incorporation of companies with provincial objects, it follows that the incorporation of companies for objects other than provincial, falls within the general powers of the Parliament of Canada."

Where the Subject-Matter is not Within Section 92

It is obviously so, and it has been frequently said by the Committee, that where the subject-matter is not within any of the sub-sections of section 92, there can be no conflict of legislative authority. The sole power is with the Dominion.

In *Citizens Insurance Company* v. *Parsons* (7 App. Cas. 96).[3] it is said :

"The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the provinces ; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz. whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the provincial legislature is or is not thereby overborne."

This view of the B.N.A. Act was approved by the Committee in *Dobie* v. *The Temporalities Board* (7 App. Cas. 136) :[4]

"The first step to be taken, with a view to test the validity of an Act of the provincial legislature, is to consider whether the

[1] *Post*, p. 317. [2] *Post*, p. 284. [3] *Post*, p. 96. [4] *Post*, p. 304.

subject-matter of the Act falls within any of the classes of subjects enumerated in section 92. If it does not, then the Act is of no validity. If it does, then these further questions may arise, viz. 'whether, notwithstanding that it is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the provincial legislature is or is not thereby overborne.'"

and in *Russell* v. *The Queen* (7 App. Cas. 829),[1] where it is said:

"Their Lordships having come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the Provincial Legislatures, it becomes unnecessary to discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in section 91."

Legislative Jurisdiction. Sections 91 and 92

It will facilitate the discussion of these most important sections of the Act if each of them is divided into two more or less artificially arranged groups, which, it will be found, conforms to the construction placed upon these sections by the decisions of the Judicial Committee.

Dominion Jurisdiction

Group 1 comprises legislation enacted under the power to make laws for the peace, order and good government of Canada, and for convenience of reference will be cited as "Peace, Order and Good Government."

Group 2 embraces all the subjects of legislative jurisdiction enumerated in the twenty-nine sub-sections of section 91, and includes the matters excepted from section 92, sub-sections 7 and 10. Hereafter this group will be cited as "the enumerated sub-sections of 91."

Provincial Jurisdiction

Group 3 comprises the first fifteen sub-sections of section 92; hereafter cited as "the enumerated sub-sections of 92."

Group 4 consists alone of sub-section 16 of section 92, and will be cited hereafter as s. 92 (16).

The last clause of section 91 marks the distinction between the two groups of that section, where it says:

"Any matter coming within any of the classes of subjects *enumerated* in this section, shall not be deemed to come within the class

[1] *Post*, p. 321.

of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

S. 92 (16) bears to the enumerated sub-sections of 92 the same relationship as peace, order and good government does to the enumerated sub-sections of section 91.

Lord Watson, speaking for the Judicial Committee in *Attorney-General of Ontario* v. *Attorney-General of Canada* (1896), A. C. 348,[1] so declares. He says:

"This section assigns to the provincial legislature all matters in a provincial sense, local and private, which have been omitted from the preceding enumeration, and although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated."

Conflict between 91 and 92

The same subject-matter may in one aspect fall under section 91, which, viewed from another standpoint, falls within section 92. In *Citizen Insurance Company* v. *Parsons*, 7 App. Cas. 96,[2] it is said:

"The scheme of this legislation, as expressed in the first branch of section 91, is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature. If the 91st section had stopped here, and if the classes of subjects enumerated in section 92 had been altogether distinct and different from those in section 91, no conflict of legislative authority could have arisen. The provincial legislatures would have had exclusive legislative power over the sixteen classes of subjects assigned to them, and the Dominion Parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in section 91; hence an endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section, 'for greater certainty, but not so as to restrict the generality of the foregoing terms of this section,' that (notwithstanding anything in the Act) the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section.

"With regard to certain classes of subjects, therefore, generally

[1] *Post*, p. 496. [2] *Post*, p. 277.

described in section 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand."

It is apparent, therefore, that there are four classes of cases in which conflict of legislative power may arise :

1. Between *peace, order, and good government* and *the enumerated sub-sections of* 92.

2. Between *peace, order, and good government* and 92 (16).

3. Between *the enumerated sub-sections of* 91 and *the enumerated sub-sections of* 92.

4. Between *the enumerated sub-sections of* 91 and 92 (16).

It is proposed to establish by reference to decisions of the Judicial Committee the following rules for determining jurisdiction :

Proposition 1

In cases of conflict between Dominion legislation under *peace, order, and good government* and *the enumerated sub-sections of* 92 or 92 (16), the latter will prevail unless it is a matter which, in its origin local and provincial, has attained such dimensions as to affect the body politic of the Dominion, in which event Dominion legislation will be valid; and if it comes into conflict with provincial legislation, the latter must give way.

Proposition 2

In case of conflict between legislation under *the enumerated sub-sections of* 91 and *the enumerated sub-sections of* 92 or 92 (16), the former will prevail, if the matter in question is of the substance

of any of the enumerated sub-sections of this group; but where the matter is incidental or ancillary to one of such enumerated sub-sections, and is also within one of the enumerated sub-sections of 92 or 92 (16), if the field is clear, provincial legislation will be valid in the absence of legislation by the Dominion. Where, however, the Dominion has legislated, the provincial legislation, if there be any, will be overborne.

First Proposition

Cases of conflict between Dominion legislation under peace, order, and good government and the enumerated sub-sections of 92 or 92 (16).

Lord Watson, in *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (1896), A. C. 348,[1] enunciates the general principles to be applied in this class of cases as follows:

"The general authority given to the Canadian Parliament by the introductory enactments of section 91 is 'to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces': and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from section 92, which is enacted by the concluding words of section 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in section 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92.

"To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by section 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once

[1] *Post*, p. 491.

conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

"In construing the introductory enactments of section 91, with respect to matters other than those enumerated, which concern the peace, order, and good government of Canada, it must be kept in view that section 94, which empowers the Parliament of Canada to make provision for the uniformity of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick does not extend to the province of Quebec; and also that the Dominion legislation thereby authorised is expressly declared to be of no effect unless and until it has been adopted and enacted by the provincial legislature. These enactments would be idle and abortive if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of section 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole.

"Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion."

Most, if not all, of the cases of this type have arisen out of legislation designed to restrain or prohibit the sale and use of intoxicating liquors. The question first came up in 1882 in the case of *Russell* v. *The Queen* (7 App. Cas. 829),[1] arising in the province of New Brunswick. At that time a Dominion law, called the Canada Temperance Act, provided that, upon a majority of the electors entitled to vote for a member of Parliament in any county or city

[1] *Post*, p. 310.

in Canada, having voted in favour of a petition to that effect in the manner provided by the Act, the sale of intoxicating liquors should be prohibited except for sacramental or medicinal purposes, or for use in some art or trade, or by distillers or brewers, merchants or traders, selling by wholesale. Violation of the Act was punishable by fine or imprisonment. A Police Magistrate in the province of New Brunswick having convicted a person of selling liquor in violation of the Act, its validity was upheld by the Supreme Court of Canada, and, upon appeal, by the Judicial Committee of the Privy Council. The Act was attacked on the ground that it invaded the field of legislative jurisdiction conferred on the province by sub-sections 9, 13, and 16 of section 92, which read :

> " 9. Shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local, or municipal purposes.
> " 13. Property and civil rights in the province.
> " 16. Generally all matters of a merely local or private nature in the province."

The Committee held that it did not fall within 9, but proceeded to say that even if such were the case, " it does not follow that the Dominion Parliament might not pass it by virtue of its general authority to make laws for the peace, order, and good government of Canada." This last remark, if not a dictum, must be read in the light of what is said by Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A. C. 361,[1] where he says :

> " Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion."

But as pointed out later, according to Lord Macnaghten in *Attorney-General for Manitoba* v. *Manitoba Licence Holders* (1902), A. C. 73,[2] if the provincial legislation in liquor licence cases is to be regarded as dealing with matters within the class of subjects enumerated in section 92, except 16, it is questionable whether the Dominion could have authority to interfere with the exclusive jurisdiction of the province by legislation falling solely under the head of peace, order, and good government.

In *Russell* v. *The Queen* (7 App. Cas. 836),[3] the Committee also held that the matters covered by the Canada Temperance Act did

[1] *Post*, p. 492. [2] *Post*, p. 578. [3] *Post*, p. 310.

not properly belong to the class of subjects mentioned in 92 (13), viz. property and civil rights in the province. The Committee says : [1]

> " Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada, which did not in some incidental way affect property and civil rights ; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects ' Property and Civil Rights ' within the meaning of sub-section 13."

This statement again must be qualified by what was said in the later cases just quoted.

The Committee also held that the legislation in question was not a matter of a merely local or private nature in the province under sub-section 16, and therefore was validly passed by the Dominion, under its general power to make laws for the peace, order, and good government of Canada.

In *Hodge* v. *The Queen* (9 App. Cas. 117),[2] in the year following the decision in *Russell* v. *The Queen*, the same question came up in an appeal from the province of Ontario. A local Act was in force there called the Liquor Licence Act (R.S.O. 1877, c. 181), which provided for the appointment of a Board of Licence Commissioners for each city or county, which should have power to make regulations defining the conditions and qualifications requisite to obtain licences, and limiting the number of licences in the locality. The Board was authorised to impose penalties for infraction of its regulations, and persons found guilty could be fined or imprisoned by a Police Magistrate. The appellant Hodge having been convicted for an infraction of the regulations, the point was raised as to the power of the local provincial legislature to pass the Act in question. The Committee held that its provisions were in the nature of police or municipal regulations of a merely local character, and did not interfere with the provisions of the Canada Temperance Act, which had not been locally adopted. The Committee said that

[1] *Post*, p. 319.

[2] *Post*, p. 333

the legislation in question seemed to come within the heads of Nos. 8 and 16 of section 92, which read as follows :

"8. Municipal institutions in the province.

"16. Generally all matters of a merely local or private nature in the province."

The next stage was the passing of an Act by the Parliament of Canada in 1883, which made provision for a Board of Licence Commissioners, having power to issue hotel, saloon, shop, vessel, and wholesale licences, and to make regulations defining the conditions and qualifications requisite to obtain licences, and limiting the number in each locality, analogous to the provisions then in force under the Ontario Act. The Act also provided that no person could sell liquor by retail or wholesale without a licence under the Act, and fine and imprisonment was provided for violation of its provisions. The validity of this legislation was the subject of a reference by the Governor-General in Council to the Supreme Court of Canada, where it was held *ultra vires*, and the same result followed upon an appeal to the Privy Council. No reasons for judgment were delivered by either tribunal, but the notes of argument before the Judicial Committee have been published, and we have the discussion between counsel and the members of the Committee.[1]

On p. 43 Sir Montague Smith says that the difference between the Act in question and the Canadian Temperance Act was that the latter was a prohibitory Act and the former a regulating Act.

This distinction is emphasized in a discussion between Sir Montague Smith and Sir Farrer Herschell on p. 64.

The following observations appear on p. 65 :

"Sir Barnes Peacock : In 1877, after the Imperial Act of 1867, an Act was passed in Ontario for licensing hours for the sale of liquors. That no doubt was a law for the good government of Upper Canada, but it was not a law for the government of the whole Dominion.

"Sir Farrer Herschell : No.

"Sir Barnes Peacock : Well, was that void because it interfered with the general provision of a law for the peace, order, and good government of Canada ?

"Sir Farrer Herschell : No.

"Sir Barnes Peacock : It was a local law, and one would suppose that that was good, notwithstanding it was for the peace, order,

[1] In the matter of The Liquor Licence Act, 1883 and 1884, Canada. Extract from printed report in the Department of Justice, Canada, from the argument of counsel, Nov. 11, 1885.

and good government of Upper Canada, but it would not be void because of the general provisions giving power to the Dominion Parliament to legislate for the peace, order, and good government of Canada—that is, Canada as embracing the whole of the provinces. Therefore you could not say that if it was a matter of a purely local nature it was not void as interfering with the general power of the Dominion, but then the law did not exclude the general power of the Dominion to legislate when they wanted a similar law extending all over the provinces."

Again, on page 94, Sir Farrer Herschell says: "Is not it a law for peace, order, and good government of the country in relation to that trade? What I wish to urge upon your Lordships is this, that even if it be held that the whole words 'regulation of trade and commerce' must receive some limitation, so that if the object of legislation is merely local and has no relation to what one may call the order or the government of the country, it may be that it does not fall within these general words, but that all legislation for the regulating of trade, if that regulation has in view the peace, order, and good government of the country, comes distinctly within the power committed to the Dominion Parliament."

"Sir Montague E. Smith: Then it would not override any of the powers in section 92?

"Sir Farrer Herschell: Yes, my Lord. I say because it is the regulation of trade and commerce.

"Sir Montague E. Smith: I beg your pardon if I did not understand you, but I thought you said, assuming it was not a regulation of trade and commerce.

"Sir Farrer Herschell: No, I said that, assuming that every regulation of trade and commerce would not be necessarily within it, I am contending that any regulation of trade which has for its object the peace, order, and good government of Canada would be within it.

"Sir Montague E. Smith: I understand it now.

"Sir Farrer Herschell: That was the point I was desiring to urge upon your Lordships—that it was not necessary for the decision of this case for me to contend that the regulation of trade and commerce had so wide an effect that every regulation of trade and commerce, however local and limited in its operation and scope, would come within these words, but that it would be enough for me, if I showed a power in the Dominion Parliament to regulate any and every trade where the object and purpose of that regulation was the peace, order, and good government of the Dominion at large. Now that is the power which I contend for in the Dominion Parliament, and if I can establish that, that is quite enough for the decision of this case, because it would leave at large many questions which have no doubt been glanced at in the argument in previous cases, and in this case, because if I once establish that whatever else may not come within No. 2, such laws as this come within the

second head of section 91, then I need not discuss any further whether the matter comes within any of the headings of section 92, because under that heading of section 91 the provisions of section 92 would be overridden. Now that, as I shall submit, would put all decisions upon a sound and intelligible footing.

Mr. Horace Davey, on page 116, says: "What was the decision in *Russell* v. *The Queen?* It was that the prohibition of the liquor traffic throughout the Dominion was a matter which was not exclusively assigned to the provincial legislatures. That is the decision—that it stood on exactly the same footing as the prohibition of the sale of poisons, for example. Or, if my learned friend pleases—I think it was an excellent illustration—the prohibition against carrying arms in the interest of public safety. But why? Because the prohibition of the sale of poisons, or the prohibition of the liquor traffic, is not one of the things exclusively assigned to the provincial legislature."

"Sir Montague Smith: That is the ground of the decision, that it did not fall within any of the matters in section 92; right or wrong, that is the decision."

It has been pointed out in *Russell* v. *The Queen* (*ante*, p. 64), that in 1878 the Parliament of Canada had passed the Canada Temperance Act, which made provision, by what was popularly called "Local Option," for prohibiting the sale of liquor in cities or townships that had by popular vote expressed their desire therefor. The Act became later c. 106 of R.S.C. 1886. Previous to Confederation similar provisions for local option had been in force in the old province of Upper Canada by a Temperance Act passed in 1864 by the old Parliament of Canada (27 & 28 Vict. c. 18). The Canada Temperance Act of 1878 repealed the old Act of 1864. The legislature of Ontario in 1890, by an Act (53 Vict., c. 56) reintroduced the former legislation of 1864, and the question of the validity of this legislation was referred to the Supreme Court of Canada by the Governor-General in Council, when it was held to be *ultra vires* by a majority of the Court, but this was reversed by the Judicial Committee. The case is reported as *Attorney-General of Ontario* v. *Attorney-General of Canada* (1896), A. C. 348.[1]

Here the Committee held that the provincial jurisdiction could not be rested on 92, sub-section 8, "Municipal Institutions in the Province," which simply gave to provincial legislatures the right to create a legal body for the management of municipal affairs. It also held that section 92 sub-section 9, was not applicable, which assigned to the provinces shop, saloon, tavern, and auctioneer and other licences in order to the raising of a revenue for provincial

[1] *Post*, p. 481.

local and municipal purposes, and that this could not be construed as authorising the abolition of the source from which the revenue was to be raised. Lord Watson says (p. 364) : [1]

> " The only enactments of section 92 which appear to their Lordships to have any relation to the authority of provincial legislatures to make laws for the suppression of the liquor traffic are to be found in Nos. 13 and 16, which assign to their exclusive jurisdiction (1) ' property and civil rights in the province,' and (2) ' generally all matters of a merely local or private nature in the province.' "

He does not determine, however, which sub-section applied, but concludes that as it did fall under one or the other it was excluded from the jurisdiction of the Parliament of Canada.

The Committee next held that the Dominion legislation then contained in the Act of 1886, being substantially the Canada Temperance Act of 1878, which was under consideration also in *Russell* v. *The Queen*, was valid except the clause which repealed the Act of 1864. It was therefore valid to the extent covered by *Russell* v. *The Queen*, viz. that the restrictive provisions of the Act, when they had been brought into operation in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order, and good government of Canada (p. 362).

This, however, did not dispose of the question because of his previous holding, that if the Dominion legislation could be justified under any of the enumerated sub-sections of section 91, all provincial legislation covering the same field would be void. He next considers the application of 91 (2), regulation of Trade and Commerce, which alone had been relied upon, and holds that it did not apply. In the final result, therefore, Lord Watson holds that the Canada Temperance Act of 1878 (afterwards R.S. of Can. 1886) was valid with the exception above mentioned ; that the Ontario legislation was also valid but as both provided for local option in the same municipal area he says (p. 368) : [2]

> " It is obvious that their provisions could not be in force within the same district or province at one and the same time."

The important holding, however, is made on p. 369,[3] that

> " If the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, their Lordships might have been constrained by previous authority to hold that the jurisdiction of the Legislature of Ontario to pass section 18 or any similar law had been superseded. In that case no provincial prohibitions such as are sanctioned by section 18 could have been enforced by

[1] *Post*, p. 494. [2] *Post*, p. 498. [3] *Post*, p. 498.

a municipality, without coming into conflict with the paramount law of Canada. For the same reason, provincial prohibitions in force within a particular district will necessarily become inoperative, whenever the prohibitory clauses of the Act of 1886 have been adopted by that district. But their Lordships can discover no adequate grounds for holding that there exists a repugnancy between the two laws in districts of the province of Ontario where the prohibitions of the Canadian Act are not and may never be in force."

In other words, the Dominion Parliament could legislate under *peace, order, and good government* in matters which, although in their origin of a local and private nature, have ceased so to be, and have become of national concern. That the provinces may legislate in the same subject-matters, and if there is no repugnancy in the operation of the two laws, both may subsist, but when they conflict the provincial law must give way.

Attorney-General of Manitoba v. *Manitoba Licence Holders Association* (1902), A. C. 73[1] contains a further word on this subject. The legislature of the Province of Manitoba on July 5, 1900, passed an Act known as " The Liquor Act " (63 & 64 Vict., c. 22). The preamble of the Act is in these words : " Whereas it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor, therefore," &c. The enactments purport to prohibit all use in Manitoba of spirituous, fermented malt, and all intoxicating liquors as beverages other than for sacramental, medicinal, mechanical, or scientific purposes, and they include divers prohibitions and restrictions affecting the importation, exportation, manufacture, keeping, sale, purchase, and use of such liquors.

The Court of King's Bench for Manitoba held this legislation *ultra vires*. This was reversed by the Judicial Committee. The Committee make the following comment upon the preceding case, on p. 79 :

" The judgment of this Board in the case of the *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (*infra*, p. 578) has relieved the case from some, if not all, of the difficulties which appear to have presented themselves to the learned judges of the Court of King's Bench. This Board held that a provincial legislature has jurisdiction to restrict the sale within the province of intoxicating liquors, so long as its legislature does not conflict with any legislative provision which may be competently made by the Parliament of Canada, and which may be in force within the province or any district thereof. It held further that there might be circumstances in which a provincial legislature might have jurisdiction to prohibit the manufacture within the province of intoxicating liquors, and the importation of

[1] *Post*, p. 574.

such liquors into the province. For the purposes of the present question it is immaterial to inquire what those circumstances may be. The judgment, therefore, as it stands, and the Report to her late Majesty consequent thereon, show that in the opinion of this tribunal, matters which are 'substantially of local or private interest in a province—matters which are of a local or private nature 'from a provincial point of view'—to use expressions to be found in the judgment, are not excluded from the category of 'matters of a merely local or private nature' because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the resources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades."

Lord Macnaghten referring to the fact that Lord Watson had not determined whether the provincial jurisdiction rested on section 92, sub-sections 13 or 16, says: "Although this particular question was thus left apparently undecided, a careful perusal of the judgments leads to the conclusion that, in the opinion of the Board, the case fell under No. 16 rather than under No. 13. And that seems to their Lordships to be the better opinion. In legislating for the suppression of the liquor traffic the object in view is the abatement or prevention of a local evil, rather than the regulation of property and civil rights, though, of course, no such legislation can be carried into effect without interfering more or less with 'property and civil rights in the province.'"

The conclusion to be drawn from Lord Watson's judgment in *Attorney-General of Canada* v. *Attorney-General of Ontario* (1896), A. C. 348,[1] is that although the Canada Temperance Act was only valid as legislation under peace, order, and good government, it would prevail over provincial legislation when they came into conflict, whether the later rested upon 92 (13) or 92 (16).

The first proposition, however, is expressed with some hesitation as regards the conflict between *peace, order, and good government* and *the enumerated sub-sections of* 92, although it is fully supported by the above decision, in view of the later case of *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A. C. 73,[2] where Lord Macnaghten says:

"It is questionable whether the Dominion could have authority under peace, order, and good government, to interfere with the exclusive jurisdiction of the province in the matters described in 92 (13)."

No case has come before the Committee where admittedly the conflict was between *peace, order, and good government* and *the enumerated sub-sections of* 92, but hypothetical cases are suggested

[1] *Post*, p. 481. [2] *Post*, p. 578.

by Lord Watson in the above case of *Attorney-General of Canada* v. *Attorney-General of Ontario* (1896), A. C. 348,[1] and the validity of certain insurance legislation enacted by the Parliament of Canada in the case of the *Insurance Reference* (48 S.C.R., p. 260), was supported by the Chief Justice on the ground that the business of fire insurance had attained in Canada such enormous dimensions as to make valid the exercise of legislative power by the Dominion. There is now pending in this case an appeal before the Judicial Committee.

There is but one decision of the Judicial Committee which is difficult to harmonise with the proposition now under discussion, nor with the entire line of previous decisions of that tribunal. It is the case of *La Compagnie Hydraulique de St. Francois* v. *Continental Heat and Light Company* (1909), A. C. 194.[2]

The appellants were incorporated by Quebec Statutes, 2 Edw. VII, c. 76, and 4 Edw. VII, c. 84, and were granted the privilege of producing and selling electricity as power, heat, and light within a radius of thirty miles from the village of Disraeli in Quebec. Section 3 of the later Act is set out in their Lordships' judgment. The respondents were incorporated under a Dominion Act, 60 & 61 Vict., c. 72. Sects. 7 and 8 defined their powers, which included that of manufacturing, supplying, selling, and disposing of gas and electricity. Section 8 empowered them, with the consent of the municipal council or other authority having jurisdiction over any highway or public place, to enter thereon for the purpose of making the necessary constructions and suitable electrical contrivances. Both companies erected buildings and installed plant and machinery, to produce and distribute electrical power within the said thirty miles radius.

Now it is to be observed that the power conferred upon the Dominion Company to manufacture, supply, and sell electricity does not bring the company within any of the subject matters mentioned in the enumerated sub-sections of section 91. The nearest section is the exception to section 92 (10), "(a) lines of steamers or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province."[3] Had this sub-section applied, the case would have been governed by *Toronto* v. *Bell Telephone Co.* (1905), A. C. 52,[4] and *Toronto*

[1] *Post*, p. 492.

[2] *Post*, p. 672.

[3] In this case the Act did not confer upon the Company power to construct lines for conveying electricity from one province to another, and it would seem a forced construction to say that by reason of its power to supply electricity it became a work or undertaking similar to a telegraph line within the meaning of this sub-section.

[4] *Post*, p. 617.

and Niagara Power Co. v. *North Toronto* (1912), A. C. 83.[1] But apparently the jurisdiction of the Dominion Parliament must be rested in this case solely upon the power to make laws for the peace, order, and good government of Canada. In such a case it could not legally trench upon legislation enacted by the provincial legislature under any of the enumerated sub-sections of section 92, unless the case fell within the exception mentioned in our first proposition, which clearly it did not. The charter of incorporation in this case of the appellant company granted by the provincial legislature, giving it exclusive rights within a circumscribed part of the provincial territory, was clearly within its power to legislate with respect to property and civil rights in the province. The judgment of the Committee pronounced by Sir Arthur Wilson is very short. He says:

> "The contention on behalf of the appellant company was that the only effect of the Canadian Act was to authorise the respondent company to carry out the contemplated operations in the sense that its doing so would not be *ultra vires* of the company, but that the legality of the company's action in any province must be dependent on the law of that province.
>
> "This contention seems to their Lordships to be in conflict with several decisions of this Board. Those decisions have established that where, as here, a given field of legislation is within the competence of both the Parliament of Canada and of the provincial legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province if the two are in conflict, as they clearly are in this case."

The last paragraph of the judgment quoted is altogether too general in its terms without doing violence to the previous decisions of the Committee, and must be read as if there were inserted after the words "Parliament of Canada" the expression "under one of the enumerated sub-sections of section 91." The clause would then read as follows:

> ". . . where, as here, a given field of legislation is within the competence of both, the Parliament of Canada, under one of the enumerated sub-sections of section 91, and of the provincial legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province if the two are in conflict, as they clearly are in this case."

It would seem that this judgment did not receive the consideration from the Board which the important constitutional principle involved therein clearly demanded.

[1] *Post*, p. 740.

Section 91 (2). Regulation of Trade and Commerce

Legislation under this one of the enumerated sub-sections of section 91 has in a recent decision been placed upon much the same plane as legislation under the power to make laws for the peace, order and good government of Canada, and it may therefore not inappropriately be discussed in this connection. Many attempts have been made to support the legislative power of the Dominion by virtue of this sub-section, but without much avail. The decisions, however, require to be considered. In *Citizens' Insurance Company* v. *Parsons* (7 App. Cas. 96),[1] the question was the validity of an Act of the province of Ontario, which prescribed certain conditions which should form part of all contracts of fire insurance entered into or in force in that province. The Committee says :[2]

> "The words 'regulation of trade and commerce,' in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of Parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place, the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature, when conferring this power on the Dominion Parliament. If the words had been intended to have the full scope of which, in their literal meaning, they are susceptible, the specific mention of several of the other classes of subjects enumerated in section 91 would have been unnecessary; as 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.
>
> "'Regulation of trade and commerce' may have been used in some such sense as the words 'regulations of trade' in the Act of Union between England and Scotland (6 Anne, c. 11), and as these words have been used in Acts of State relating to trade and commerce. Article 5 of the Act of Union enacted that all the subjects of the United Kingdom should have 'full freedom and intercourse of trade and navigation' to and from all places in the United Kingdom and the colonies; and Article 6 enacted that all parts of the United Kingdom from and after the Union should be under the *same* 'prohibitions, restrictions, and *regulations of trade*.' Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the Articles of Union. Thus the Acts for regulating the sale of intoxi-

[1] *Post*, p. 267. [2] *Post*, p. 280.

cating liquors notoriously vary in the two kingdoms. So with regard to Acts relating to bankruptcy, and various other matters.

"Construing, therefore, the words 'regulation of trade and commerce' by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of section 92."

In *Russell* v. *The Queen* (7 App. Cas. 829) the Committee says (p. 842) : [1]

"Their Lordships having come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the provincial legislatures, it becomes unnecessary to discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in section 91. In abstaining from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other judges, who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject, 'the regulation of trade and commerce,' enumerated in that section, and was, on that ground, a valid exercise of the legislative power of the Parliament of Canada."

In *Hodge* v. *The Queen* (9 App. Cas. 117) [2] it is said :

"The appellants contended that the legislature of Ontario had no power to pass any Act to regulate the liquor traffic, that the whole power to pass such an Act was conferred on the Dominion Parliament, and consequently taken from the provincial legislature, by section 91 of the British North America Act, 1867 ; and that it did not come within any of the classes of subjects assigned exclusively to the provincial legislatures by section 92. The class in section 91, which the Liquor Licence Act, 1877, was said to infringe was No. 2, 'The Regulation of Trade and Commerce,' and it was urged that the decision of this Board in *Russell* v. *Regina* (7 App. Cas. 829) was conclusive that the whole

[1] *Post*, p. 321. [2] *Post*, p. 343.

subject of the liquor traffic was given to the Dominion Parliament, and consequently taken away from the provincial legislature. It appears to their Lordships, however, that the decision of that tribunal in that case has not the effect supposed, and that, when properly considered, it should be taken rather as an authority in support of the judgment of the Court of Appeal."

In *Attorney-General of Ontario* v. *Attorney-General of Canada* (1896), A. C. 348,[1] Lord Watson says:

"That point being settled by decision, it becomes necessary to consider whether the Parliament of Canada had authority to pass the Temperance Act of 1886 as being an Act for the 'regulation of trade and commerce' within the meaning of No. 2 of section 91. If it were so, the Parliament of Canada would, under the exception from section 92 which has already been noticed, be at liberty to exercise its legislative authority, although in so doing it should interfere with the jurisdiction of the provinces. The scope and effect of No. 2 of section 91 were discussed by this Board at some length in *Citizens' Insurance Co.* v. *Parsons* (7 App. Cas. 96), where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the legislature of Ontario had authority to impose conditions, as being matters of civil rights, upon the business of fire insurance, which was admitted to be a trade, so long as these conditions only affected provincial trade. Their Lordships do not find it necessary to reopen that discussion in the present case. The object of the Canada Temperance Act of 1886 is, not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view, their Lordships are unable to regard the prohibitive enactments of the Canadian statute of 1886 as regulations of trade and commerce. They see no reason to modify the opinion which was recently expressed on their behalf by Lord Davey in *Municipal Corporation of the City of Toronto* v. *Virgo* (1896), A. C. 88, in these terms: 'Their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.'"

And finally, in *Montreal* v. *Montreal Street Railway* (1912), A. C. 333,[2] Lord Atkinson says:

"If the Parliament of Canada had authority to make laws applicable to the whole Dominion, in relation to matters which,

[1] *Post*, p. 493. [2] *Post*, p. 720.

in each province, are substantially of local or private interest, upon the assumption that those matters also concern the peace, order, and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in section 91, namely, the regulation of trade and commerce. Taken in their widest sense these words would authorise legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in section 92, and would seriously encroach upon the local autonomy of the province. In their Lordships' opinion these pronouncements have an important bearing on the question for decision in the present case, though the case itself in which they were made was wholly different from the present case, and the decision given in it has little if any application to the present case. They apparently established this, that the invasion of the rights of the province which the Railway Act and the Order of the Commissioners necessarily involve in respect of one of the matters enumerated in section 92, namely, legislation touching local railways, cannot be justified on the ground that this Act and Order concern the peace, order, and good government of Canada, nor upon the ground that they deal with the regulation of trade and commerce."

Second Preposition

In case of conflict between legislation under the enumerated sub-sections of 91, and the enumerated sub-sections of 92 or 92 (16), the former will prevail, if the matter in question is of the substance of any of the enumerated sub-sections of this group; but where the matter is incidental or ancillary to one of such enumerated sub-sections, and is also within one of the enumerated sub-sections of 92 or 92 (16), if the field is clear, provincial legislation will be valid in the absence of legislation by the Dominion. Where, however, the Dominion has legislated, the provincial legislation, if there be any, will be overborne.

Substantive and Ancillary Matters

The distinction between what is of the substance of the matters contained in the enumerated sub-sections of section 91, and what is ancillary or incidental thereto, is not at all clearly expressed in the earlier decisions of the Judicial Committee, but the distinction, however, is the basis upon which many of the earlier cases rest.

In the case of the *Attorney-General of Canada* v. *Attorney-General for Ontario* (1894), A. C. 189,[1] Lord Chancellor Herschell

[1] *Post*, p. 447.

for the first time uses the expression ancillary, under the following circumstances :

Jurisdiction to legislate in matters of bankruptcy and insolvency is exclusively conferred upon the Parliament of Canada by section 91, yet in the absence of federal legislation it was held that legislation by the province in matters which were only incidental to the substantive jurisdiction conferred, was valid. In this case the question arose as to whether, in view of the above provisions of section 91, legislation by the province under an Act (R.S.O. (1887), c. 124) respecting assignment and preferences of insolvent persons, was valid. Section 9 read as follows :

"An assignment for the general benefit of creditors, under this Act, shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriff's hands."

The Judicial Committee says : [1]

"It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various *ancillary* provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature, when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence."

Four years later Lord Herschell uses the same expression in the case of the *Attorney-General of Canada* v. *Attorneys-General for Ontario, Quebec, &c.* (1898, A. C. 700).[2] He there says :

"It is true this Board held, in the case of the *Attorney-General of Canada* v. *Attorney-General for Ontario*,[3] that a law passed by

[1] *Post*, p. 456. [2] *Post*, p. 556. [3] *Post*, p. 447.

provincial legislature, which affected the assignments and property of insolvent persons, was valid as falling within the heading 'property and civil rights,' although it was of such nature that it would be a suitable *ancillary* provision to a bankruptcy law."

In *Grand Trunk Railway Co.* v. *Attorney-General of Canada* (1907), A. C. 65,[1] Lord Dunedin said :[2]

"The question in this appeal is as to the competency of the Dominion Parliament to enact the provisions contained in section 1 of 4 Edw. VII, c. 31, of the Statutes of Canada. These provisions may be generally described as a prohibition against any 'contracting out' on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants.

"It is not disputed that, in the partition of duties effected by the British North America Act, 1867, between the provincial and the Dominion legislatures, the making of laws for through railways is entrusted to the Dominion.

"The point, therefore, comes to be within a very narrow compass. The respondent maintains, and the Supreme Court has upheld his contention, that this is truly railway legislation. The appellants maintain that, under the guise of railway legislation, it is truly legislation as to civil rights, and, as such, under section 92, sub-section 13, of the British North America Act, appropriate to the province.

"The construction of the provisions of the British North America Act has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894—viz. *Attorney-General of Ontario* v. *Attorney-General of Canada* (1894), A. C. 189,[3] and *Tennant* v. *Union Bank of Canada* (1894), A. C. 31 [4]—seems to establish these two propositions : First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear ; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

"Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right, which may be conceded, but whether this law is truly ancillary to railway legislation.

"It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion legislature, which is admitted, it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is

[1] *Post*, p. 636. [2] *Post*, p. 638. [3] *Post*, p. 447. [4] *Post*, p. 433.

inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intra familiam*, than in the numerous cases which may be figured where the civil rights of outsiders may be affected. As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers."

In *Toronto* v. *Canadian Pacific Railway Co.* (1908), A. C. 54,[1] Lord Collins said (p. 57) :[2]

"The question on this appeal is as to the liability of the appellants, the corporation of the city of Toronto, to pay a share of the cost of certain protective measures ordered by the Railway Committee of the Privy Council of Canada for the purpose of safeguarding the public in traversing the respondents' railway, and the railway itself, at certain level crossings where it passes across public streets at points within or immediately adjoining the city boundary. At two of the crossings the southern boundary of the railway is the northern boundary of the city. In the third the crossing is wholly within the city.

"The order of the Railway Committee, which was dated January 8, 1891, and purported to be made under the 187th and 188th sections of the Dominion Railway Act, 1888 (51 Vict., c. 29), directed that gates and watchmen should be provided and maintained by the railway company at the said crossings, and that the cost thereof should be borne in equal proportions by the railway company and the corporation. Some two years later there was a slight readjustment of the proportions, but nothing turns on this. The corporation continued to pay the adjusted proportion without complaint down to 1901, when they disputed liability and ceased payment. Hence this action, in which the railway sued the corporation to recover the apportioned amount. No question arises as to the amount, if liability is established, but the appellants contend that the sections under which the order was made were *ultra vires* of the Dominion Parliament, and that even if they were *intra vires* the corporation did not fall within the words 'any person interested therein' in section 188, and could not, therefore, be made liable to pay any apportioned share of the expenses.

"First, with regard to the question of *ultra vires*. There is no doubt that 'railways connecting the province with any other or others of the provinces' are expressly excepted from the jurisdiction of the provinces, and placed under the exclusive jurisdiction of the Parliament of the Dominion by the Imperial statute 30 & 31 Vict., c. 3, the British North America Act, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10 (*a*). On the other hand, by s. 92 of the same Act, municipal institutions in the province and property and civil rights in the province are placed under the exclusive power of the provincial legislature. Questions of conflict between the two juris-

[1] *Post*, p. 653. [2] *Post*, p. 656.

dictions, that of the Dominion and that of the province, have frequently come before this Board, and the result of the decisions is thus summed up by Lord Dunedin, in delivering the judgment in the most recent case, *Grand Trunk Railway Co.* v. *Attorney-General of Canada* (1907), A. C. 68.[1] He treats the following propositions as established :

" ' First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear ; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.'

" In the present case it seems quite clear to their Lordships that if, to use the language above quoted, ' the field were clear,' the sections impugned do no more than provide reasonable means for safeguarding in the common interest the public and the railway which is committed to the exclusive jurisdiction of the legislature which enacted them, and were, therefore, *intra vires*. If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and in the view of their Lordships there is nothing *ultra vires* in the ancillary power conferred by the sections on the committee to make an equitable adjustment of the expenses among the persons interested. Both the substantive and the ancillary provision are alike reasonable and *intra vires* of the Dominion legislature, and on the principles above cited must prevail, even if there is legislation *intra vires* of the provincial legislature dealing with the same subject-matter and in some sense inconsistent. But it seems to their Lordships that in truth there is no real inconsistency, and both may stand together."

The principle we are discussing was held by Lord Watson, in the *Attorney-General for Ontario* v. *Attorney-General for Canada* (1896), A. C. 348,[2] to be the *ratio decidendi* of the judgment of the Privy Council in the *Citizens' Insurance Co.* v. *Parsons* (7 App. Cas. 96).[3]

In the latter case a statute was passed by the legislature of the province of Ontario, which declared what conditions alone should apply to contracts of fire insurance in the province, and it was contended that the local legislation was *ultra vires*, as the matter was one either of peace, order, and good government, or of trade and commerce assigned to the Dominion Parliament by section 91. It was admitted that the legislation in question also fell within section 92 (13), property and civil rights in the province. The provincial legislation was upheld in *Citizens' Insurance Co.* v. *Parsons*, and Lord Watson, in referring to the case, says :[4]

" The scope and effect of No. 2 of s. 91 were discussed by this Board at some length in *Citizens' Insurance Co.* v. *Parsons*, where

[1] *Post*, p. 657. [2] *Post*, p. 481. [3] *Post*, p. 267. [4] *Post*, p. 493.

it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade."

He also says :[1]

"It also appears to their Lordships that the exception (contained in the concluding words of sec. 91) was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen subsections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is *necessarily incidental* to the exercise of the powers conferred upon it by the enumerated heads of Clause 91."

In *Montreal* v. *Montreal Street Railway* (1912), A. C. 333.[2] Lord Atkinson, speaking for the Committee, says that the Dominion legislation must be *necessarily incidental* to one of the enumerated sub-sections of 91.

The Board of Railway Commissioners appointed under the Dominion Railway Act, is given jurisdiction over Dominion Railways. Section 92 sub-section 10 gives jurisdiction to the Parliament of Canada with respect to Dominion railways, and also with respect to provincial railways, if they are declared by the Parliament of Canada to be for the general advantage of Canada.

There were in the city of Montreal two street railways, one called the Montreal Park and Island Railway and the other the Montreal Street Railway. The former road had been declared by the Parliament of Canada a work for the general advantage of Canada under the above sub-section, and therefore became a federal railway. A complaint having been made to the Board that an unjust discrimination had been made, the Board made an order that the Montreal Street Railway Company, a purely provincial company, should enter into an agreement with the Montreal Park and Island Railway with respect to *through-tariff*, and the question arose as to whether or not the Board had jurisdiction to make such an order. The Committee says :[3]

"It has, no doubt, been many times decided by this Board that the two sections 91 and 92 are not mutually exclusive, that the provisions may overlap, and that where the legislation of the Dominion Parliament comes into conflict with that of a provincial legislature over a field of jurisdiction common to both the former must prevail : but, on the other hand, it was laid down in *Attorney-General of Ontario* v. *Attorney-General of the Dominion* (1896),

[1] *Post*, p. 490. [2] *Post*, p. 720. [3] *Post*, p. 720.

A. C. 348 :[1] (1) That the exception contained in s. 91, near its end, was not meant to derogate from the legislative authority given to provincial legislatures by the 16th sub-section of s. 92, save to the extent of enabling the Parliament of Canada to deal with matters, local or private, in those cases where such legislation is *necessarily* incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in s. 91; (2) that to those matters which are not specified amongst the enumerated subjects of legislation in s. 91, the exception at its end has no application, and that in legislating, with respect to matters not so enumerated, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial legislature by s. 92; (3) that these enactments, ss. 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in s. 92; (4) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by s. 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces: and, lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. . . . .

"It follows, therefore, that the Act and Order if justified at all must be justified on the ground that they are necessarily incidental to the exercise by the Dominion Parliament of the powers conferred upon it by the enumerated heads of s. 91.

"Well, the only one of the heads enumerated in s. 91, dealing expressly or impliedly with railways, is that which is interpolated by the transfer into it of sub-heads (*a*), (*b*), and (*c*) of sub-s. 10 of s. 92. Lines such as the Street Railway are not amongst these.

"In other words, it must be shown that it is *necessarily incidental* to the exercise of control over the traffic of a federal railway, in respect of its giving an unjust preference to certain classes of its passengers or otherwise, that it should also have power to exercise control over the 'through' traffic of such a purely local thing as a provincial railway properly so called, if only it be connected with a federal railway. . . . The right contended for in this case is, in truth, the absolute right of the Dominion Parliament wherever a federal line and a local provincial line connect to establish, irrespective of all consequences, this dual control over the latter line

[1] *Post*, p. 481.

whenever there is through traffic between them, at least of such a kind as would lead to unjust discrimination between any classes of the customers of the former line. In their Lordships' view this right, and power is *not necessarily incidental* to the exercise by the Parliament of Canada of its undoubted jurisdiction and control over federal lines, and is, therefore, they think, an unauthorised invasion of the rights of the legislature of the province of Quebec."

The principle we are discussing would appear to underlie the following early decision of the Judicial Committee.

In *L'Union St. Jacques de Montréal* v. *Bélisle* (L.R. 6, P.C. 31).[1] the question arose as to the validity of an Act of the provincial legislature of Quebec intituled "An Act to relieve the Union St. Jacques de Montréal" where the financial condition of the association would not permit of it carrying on business without going into insolvency without some modification being made with respect to the rights of its members, and the Act was passed to give such relief. The Judicial Committee said :[2]

"The sole question in this appeal is this : whether the subject matter of the Provincial Act (33 Vict., c. 58) is one of those which, by the 91st section of the Dominion Act, are reserved exclusively for legislation by the Dominion legislature. This Act deals solely with the affairs of that particular society, and in this manner, taking notice of a certain state of embarrassment resulting from what it describes in substance as improvident regulations of the society, it imposes a forced commutation of their existing rights upon two widows, who at the time when that Act was passed, were annuitants of the society under its rules, reserving to them the rights so cut down in the future possible event of the improvement up to a certain point of affairs of the association. Clearly this matter is private ; clearly it is local, so far as locality is to be considered, because it is in the province and in the city of Montreal ; and unless, therefore, the general effect of that head of s. 92 is for this purpose qualified by something in s. 91, it is a matter not only within the competency, but within the exclusive competency of the provincial legislature. Now s. 91 qualifies it undoubtedly, if it be within any one of the different classes of subjects there specially enumerated ; because the last and concluding words of s. 91 are : 'And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the province.' But the *onus* is on the respondent to show that this, being of itself of a local or private nature, does also come within one or more of the classes of subjects specially enumerated in the 91st section.

[1] *Post*, p. 206. [2] *Post*, p. 209.

"Now it has not been alleged that it comes within any other class of the subjects so enumerated except the 21st, 'Bankruptcy and Insolvency,' and the question therefore is, whether this is matter coming under that class 21, of bankruptcy and insolvency? Their Lordships observe that the scheme of enumeration in that section is, to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may be properly described as *general legislation*; such legislation, as is well expressed by Mr. Justice Caron when he speaks of the general laws governing *Faillite*, bankruptcy, and insolvency, all which are well-known legal terms expressing systems of legislation with which the subjects of this country, and probably of most other civilised countries, are perfectly familiar. The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including, of course, the conditions in which that law is to be brought into operation, and the effect of its operation. Well, no such general law covering this particular association is alleged ever to have been passed by the Dominion. The hypothesis was suggested in argument by Mr. Benjamin, who certainly argued this case with his usual ingenuity and force, of a law having been previously passed by the Dominion Legislature, to the effect that any association of this particular kind throughout the Dominion, on certain specified conditions assumed to be exactly those which appear upon the face of this statute, should thereupon, *ipso facto*, fall under the legal administration in bankruptcy or insolvency. Their Lordships are by no means prepared to say that if any such law as that had been passed by the Dominion Legislature it would have been beyond their competency; nor that, if it had been so passed, it would have been within the competency of the provincial legislature afterwards to take a particular association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency. But no such law ever has been passed; and to suggest the possibility of such a law as a reason why the power of the provincial legislature over this local and private association should be in abeyance or altogether taken away, is to make a suggestion which, if followed up to its consequences, would go very far to destroy that power in all cases."

Substantive Legislative Power

The first part of the Second Proposition, which says that in case of conflict between the enumerated subsections of 91 and the enumerated subsections of 92 or 92 (16), the former will prevail, is precisely what is enacted by section 91, which says that the *exclusive* Legislative Authority of the Parliament of Canada extends

to all matters coming within the classes of subjects next hereinafter enumerated, and that any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in section 92.

In *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A. C. 760,[1] the Committee says : [2]

> " By s. 91 of the British North America Act, the Parliament of the Dominion of Canada is empowered to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by that Act assigned exclusively to the legislatures of the provinces. ' and for greater certainty but not so as to restrict the generality of the foregoing terms of this section,' it is declared that (notwithstanding anything in this Act) ' the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next thereinafter enumerated.'
>
> " The earlier part of this section read in connection with the words beginning, ' and for greater certainty,' appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in s. 91 is not within the legislative competence of the Provincial Legislatures under s. 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the ' exclusive ' legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a provincial legislature is, in their Lordships' opinion, incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of s. 91, and in particular to the word ' exclusively.' It would authorise, for example, ' the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act.' "

In the following cases the jurisdiction of the Parliament of Canada was upheld, upon the ground that the legislation was of the substance of the enumerated subsections of 91. The cases are collected under their appropriate subsections.

[1] *Post*, p. 542. [2] *Post*, p. 555.

Section 91 (3). Taxation. (*Vide* s. 92 (2))[1]

Section 91 (12). Sea-Coast and Inland Fisheries

In the *Attorney-General for Canada* v. *Attorney-General for the Provinces of Ontario, &c.* (1898), A. C. 700,[2] it was contended, amongst other things by the provinces, that although the exclusive legislative authority of the Parliament of Canada extended to the subject of sea-coast and inland fisheries, nevertheless regulations might be made by the provinces with respect to these matters which would be valid, in the absence of legislation covering the same subject-matter by the Dominion Parliament. This view was expressly negatived,[3] and the legislative power of the Dominion was thus expressed by Lord Herschell:

> "It must be remembered that the power to legislate in relation to fisheries does necessarily, to a certain extent, enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislation. In addition, however, to the legislative power conferred by the 12th item of s. 91, the 3rd item of that section confers upon the Parliament of Canada the power of raising money by any mode or system of taxation. Their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of licence as a condition of the right to fish."

Section 91 (15). Banking, Incorporation of Banks, and the Issue of Paper Money

In the case of *Tennant* v. *Union Bank* (1894), A. C. 31,[4] the question arose with respect to certain warehouse receipts which were valid under the Dominion Bank Act, but were not negotiable instruments within the meaning of the Provincial Act. As to this the Judicial Committee said:[5]

> "S. 91 gives the Parliament of Canada power to make laws in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the legislatures of the provinces, and also exclusive legislative authority in relation to certain enumerated subjects, the fifteenth of which is "Banking, Incorporation of Banks, and the Issue of Paper Money." S. 92 assigns to each provincial legislature the exclusive right to make laws in relation to the classes

[1] *Post*, p. 97. [2] *Post*, p. 542. [3] *Post*, p. 553. [4] *Post*, p. 433. [5] *Post*, p. 444.

of subjects therein enumerated; and the thirteenth of the enumerated classes is "Property and Civil Rights in the Province."

"Statutory regulations with respect to the form and legal effect in Ontario, of warehouse receipts and other negotiable documents, which pass the property of goods without delivery, unquestionably relate to property and civil rights in that province; and the objection taken by the appellant to the provisions of the Bank Act would be unanswerable if it could be shown that, by the Act of 1867, the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislature by s. 92. But s. 91 expressly declares that, 'notwithstanding anything in this Act,' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in s. 91 are 'Patents of Invention and Discovery,' and 'Copyrights.' It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces.

"The law being so far settled by precedent, it only remains for consideration whether warehouse receipts, taken in security by a bank in the course of the business of banking, are matters coming within the class of subjects described in s. 91, sub-s. 15, as 'Banking, Incorporation of Banks, and the Issue of Paper Money.' If they are, the provisions made by the Bank Act with respect to such receipts are *intra vires*. The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the province does not, and cannot, attach to it. It also comprehends 'banking,' an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker.

"The appellant's counsel hardly ventured to dispute that the lending of money on the security of goods, or of documents representing the property of goods, was a proper banking transaction. Their chief contention was that, whilst the legislature of Canada had power to deprive its own creature, the bank, of privileges enjoyed by other lenders under the provincial law, it had no power to confer upon the bank any privilege as a lender which the provincial law does not recognise. It might enact that a security, valid in the case of another lender, should be invalid in the hands of the bank, but could not enact that a security should be available to the bank which would not have been effectual in the hands of another lender. It

was said in support of the argument, that the first of these things did, and the second did not, constitute an interference with property and civil rights in the province. It is not easy to follow the distinction thus suggested. There must be two parties to a transaction of loan; and, if a security, valid according to provincial law, was made invalid in the hands of the lender by a Dominion statute, the civil rights of the borrower would be affected, because he could not avail himself of his property in his dealings with a bank.

"But the argument, even if well founded, can afford no test of the legislative powers of the Parliament of Canada. These depend upon s. 91, and the power to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights in the province. And it appears to their Lordships that the plenary authority given to the Parliament of Canada by s. 91, sub-s. 15, to legislate in relation to banking transactions is sufficient to sustain the provisions of the Bank Act which the appellant impugns.

"On these grounds, their Lordships have come to the conclusion that the judgments appealed from ought to be affirmed, and they will humbly advise Her Majesty to that effect. The appellant must bear the costs of this appeal."

Section 91 (21). Bankruptcy and Insolvency

In the case of *Cushing* v. *Dupuy*, 5 App. Cas. 415,[1] Sir Montague Smith says:

"It was contended for the appellant that the provisions of the Insolvency Act interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the Legislature of the province.

"The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realisation and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them."[2]

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[1] *Post*, p. 259.

[2] Cf. *L'Union St. Jacques* v. *Bélisle*, *post*, p. 206; *Cushing* v. *Dupuy*, *post*, p. 253; *Ontario* v. *Canada*, *post*, p. 447.

Section 91 (25). Naturalisation and Aliens

In *Union Colliery Co. of British Columbia* v. *Bryden* (1899), A. C., 580,[1] Lord Watson said :[2]

"The appellant company carries on the business of mining coal by means of underground mines, in lands belonging to the company, situated near to the town of Union in British Columbia. The company have hitherto employed, and still continue to employ, Chinamen in the working of these underground mines.

"By s. 4 of the Coal Mines Regulation Act, 1890 (British Columbia), it is expressly enacted that 'no boy under the age of twelve years, and no woman or girl of any age, *and no Chinaman*, shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground.'

"The only question the Committee was invited to consider was whether the enactment of s. 4 in regard to which the company had stated the plea of *ultra vires*, was within the competency of the British Columbia legislature.

"There can be no doubt that, if s. 92 of the Act of 1867 had stood alone and had not been qualified by the provisions of the clause which precedes it, the provincial legislature of British Columbia would have had ample jurisdiction to enact s. 4 of the Coal Mines Regulation Act. The subject-matter of that enactment would clearly have been included in s. 92, sub-s. 10, which extends to provincial undertakings such as the coal mines of the appellant company. It would also have been included in s. 92, sub-s. 13, which embraces 'Property and Civil Rights in the Province.'

"But s. 91, sub-s. 25 extends the exclusive legislative authority of the Parliament of Canada to 'naturalisation and aliens.' S. 91 concludes with a proviso to the effect that 'any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the province.'

"S. 4 of the Provincial Act prohibits Chinamen who are of full age from employment in underground coal workings. Every alien when naturalised in Canada becomes, *ipso facto*, a Canadian subject of the Queen; and his children are not aliens, requiring to be naturalised, but are natural-born Canadians. It can hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada; but s. 91, sub-s. 25, might possibly be construed as conferring that power in the case of naturalised aliens after naturalisation. The subject of 'naturalisation' seems *prima facie* to include the power of enacting what shall be the consequences of naturalisation, or, in other words, what shall be the rights and privileges pertaining to residents

[1] *Post*, p. 564. [2] *Post*, pp. 566, 568.

in Canada after they have been naturalised. It does not appear to their Lordships to be necessary in the present case, to consider the precise meaning which the term 'naturalisation' was intended to bear, as it occurs in s. 91, sub-s. 25. But it seems clear that the expression 'aliens' occurring in that clause refers to, and at least includes, all aliens who have not yet been naturalised; and the words 'no Chinaman,' as they are used in s. 4 of the Provincial Act, were probably meant to denote, and they certainly include, every adult Chinaman who has not beeen naturalised. . . .

"Their Lordships see no reason to doubt that, by virtue of s. 91, sub-s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalised subjects, and therefore trench upon the exclusive authority of the Parliament of Canada."

This decision is considerably qualified by the following: *Cunningham* v. *Tomey Homma* (1903), A. C. 151.[1]

By the Provincial Elections Act of British Columbia (Revised Statutes of British Columbia, 1897, c. '67) it is enacted (amongst other things) as follows:

8. No Chinaman, Japanese, or Indian shall have his name placed on the register of voters for any electoral district or be entitled to vote at any election. Any collector of voters who shall insert the name of any Chinaman, Japanese or Indian in any such register shall, upon summary conviction thereof before any justice of the peace, be liable to a penalty not exceeding $50.00.

The Supreme Court of British Columbia held that the above section related to a matter of naturalisation and was excluded from the legislative jurisdiction of the province. The Committee says:[2]

"Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of s. 91, sub-s. 25 would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalisation. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion; that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance

[1] *Post*, p. 594. [2] *Post*, p. 598.

are necessarily involved in the nationality conferred by naturalisation; but the privileges attached to it, where these depend upon residence, are quite independent of nationality."

The provincial legislation was upheld.

In *Attorney-General for Canada* v. *Cain* (1906), A. C. 542,[1] the question for decision was the validity of a Dominion Statute, 60 & 61 Vict. c. 11, styled the "Alien Labour Act."

"The validity of s. 6 was impeached on several grounds in the provincial Court, and was held to transcend the powers of the Dominion Parliament, inasmuch as it purported to authorise the Attorney-General or his delegate to deprive persons against whom it was to be enforced of their liberty without the territorial limits of Canada, and upon this point alone the decision of the case turned."

The Committee says:[2]

"If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the Government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose had the statute never been passed."

S. 91 (27). The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

In *Hodge* v. *The Queen*, 9 App. Cas. 117,[3] which held valid a statute of the province of Ontario, empowering a Board of Licence Commissioners to make regulations respecting tavern and shop licences, and to impose penalties for infraction of its provisions, Lord Fitzgerald says:[4]

"If, as their Lordships have decided, the subjects of legislation come within the powers of the provincial legislature, then No. 15 of s. 92 of the British North America Act, which provides for 'the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section,' is applicable to the case before us, and is not in conflict with No. 27 of s. 91 under these very general terms 'the imposition of punishment by imprisonment for enforcing any law.' It seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison, that which is generally incident to it, 'hard labour'; in other words, that imprisonment there means

[1] *Post*, p. 631. [2] *Post*, p. 636. [3] *Post*, p. 333. [4] *Post*, p. 347.

restraint by confinement in a prison, with or without its usual accompaniment, 'hard labour.'"

Attorney-General for Ontario v. *Hamilton Street Railway* (1903), A. C. 524.[1] The legislature of the province of Ontario passed a statute called "An Act to prevent the Profanation of the Lord's Day." In this case the Lord Chancellor says:[2]

"The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. S. 91, sub-s. 27, of the British North America Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada 'the criminal law, except the constitution of courts of criminal jurisdiction.' It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation at the time of confederation, is an offence against the criminal law."

S. 92 (10). Local Works and Undertakings other than such as are of the following classes

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.

(*b*) Lines of steamships between the province and any British or foreign country.

(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces.

In the case of *Madden* v. *The Nelson and Fort Sheppard Railway Co.* (1899), A. C. 626,[3] the provincial Court held that a railway company which had become a Dominion railway by reason of it having been declared by the Parliament of Canada to be a work for the general advantage of Canada, was not subject to an Act passed by the legislature of the province of British Columbia, which declared that in absence of proper fences, any railway company incorporated under the authority of the Parliament of Canada, or declared by the said Parliament to be for the general advantage of

[1] *Post*, p. 600. [2] *Post*, p. 604. [3] *Post*, p. 571.

Canada, should be held responsible for cattle injured or killed on their railways by their engines. As to this the Privy Council said :[1]

"Their Lordships are of opinion that in this case the judgment appealed from ought to be affirmed. The course of the argument has been rather to suggest that if there is no direct enactment in the statute (the Cattle Protection Act, 1891, 54 Vict. c. 1 (B.C.), as amended by the Cattle Protection Act, 1895, 58 Vict. c. 7 (B.C.)) —the validity of which is in question—to create any erection or construction of the works of the railway, that it would avoid the objection of the statute being *ultra vires*. But their Lordships are not disposed to yield to that suggestion, even if it were true to say that this statute was only an indirect mode of causing the construction to be made, because it is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly. But it is an under-statement of the difficulties in the way of the appellants to speak of it as an indirect operation of the statute, to direct that this company should erect fences and provide against the particular class of accident which happened in this case, because the provincial legislature that passed this enactment seem to have been under the impression that they were not proceeding indirectly at all—that they were proceeding directly, and the preamble of their statute points out what they were intending to do. . . . In other words, the provincial legislature have pointed out by their preamble that in their view the Dominion Parliament has neglected proper precautions, and that they are going to supplement the provisions which, in the view of the provincial legislature, the Dominion Parliament ought to have made; and they thereupon proceed to do that which they recite the Dominion Parliament has omitted to do. It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the Provincial Parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them and is, therefore, manifestly *ultra vires*."

The line of demarkation between what is of the substance and what is incidental or ancillary to one of the enumerated subsections of section 91, is well shown in comparing the case just mentioned and the following : *C.P.R.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1899), A. C. 367.[2]

Here the local municipality ordered the railway company to clean a ditch which was within the railway lands between the railway track and the boundary of the railway property. The company did not comply with the notice, and the respondents brought an action in the Superior Court setting out the facts and

[1] *Post*, p. 572.

[2] *Post*, p. 558.

claiming damages to the amount of $200. The only defence of the company was that the municipality had no power to make such an order against a Dominion railway company, and that the order would have the result of affecting the physical condition of the railway.[1]

> The Committee says (p. 373): "It therefore appears to their Lordships that any attempt by the legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorised works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the legislature of Quebec."

Toronto v. *Bell Telephone Co.* (1905), A. C. 58.[2] The Bell Telephone Company was incorporated by Dominion Act under the provisions of section 92, sub-section 10, which provided that telegraphs and other works and undertakings connecting one province with another or extending beyond the limits of the province should be solely under the federal control.

The question arose how far an act of the legislature of the province of Ontario was valid which required that the company, before exercising its power in constructing a pole line through a municipality should receive the consent of the municipal council, and it was held that the Dominion Act was within the exclusive competence of the Dominion Parliament, and that the company was entitled, without the consent of the municipal corporation, to enter upon the streets and highways of the city of Toronto, and to construct conduits or lay cables thereunder or to erect poles with wires affixed thereto upon or along such streets or highways.

Vide also *Grand Trunk Railway* v. *Attorney-General of Canada* (1907), A. C. 65, *supra*, p. 80,[3] and *Toronto* v. *The Canadian Pacific Railway Co.* (1908), A. C. 54,[4] *supra*, p. 653 ;[5] *Montreal* v. *The Montreal Street Railway* (1912), A. C. 333,[6] *supra*, p. 711 ;[7] and *Attorney-General of British Columbia* v. *The Canadian Pacific Railway Co.* (1906), A. C. 204,[8] *infra*, p. 134 ;[9] *McGregor* v. *Esquimalt Rly.* (1907), A. C. 462 ; *Toronto Railway* v. *North Toronto* (1912), A. C. 834.[10]

[1] *Post*, p. 562. [2] *Post*, p. 617. [3] *Post*, p. 636. [4] *Ante*, p. 81. [5] *Post*, p. 683.
[6] *Ante*, p. 83. [7] *Post*, p. 711. [8] *Post*, p. 134. [9] *Post*, p. 647. [10] *Post*, p. 740.

Exclusive Jurisdiction in the Provinces

We have now to consider cases arising under the enumerated sub-sections of section 92.

S. 92 (2). Direct Taxation within the Province in Order to the Raising of a Revenue for Provincial Purposes.

Dow v. *Black*, L.Q. 6 P.C. 272 (*infra*, p. 212). In this case it was held that the provincial legislature is enabled under this sub-section to impose direct taxation for local purposes upon a particular locality.[1]

Attorney-General for the *Province of Quebec* v. *The Queen Insurance Company* (3 App. Cas. p. 1090).[2] The legislature of Quebec passed a statute (39 Vict., c. 7), which enacted that every assurer carrying on in the province any business of assurance, other than that of marine insurance exclusively, should be bound to take out a licence in each year, and that the price of the licence should consist in the payment to the Crown in stamps, of a percentage on the amount received as premium, the stamp to be affixed on each policy receipt or renewal.

The Committee first held that the legislation could not be supported under s. 92 (9). It was not a licensing Act. As to its being direct taxation, the Committee says:[3]

> "The single point to be decided upon this is whether a Stamp Act—an Act imposing a stamp on policies, renewals or receipts, with provisions for avoiding the policy, renewal or receipt, in a Court of law, if the stamp is not affixed,—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and in trying to find out their meaning, we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the Court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the Courts of law. Taken in either way there is a multitude of authorities to show that such a stamp imposed by the legislature is not direct taxation."

Attorney-General of Quebec v. *Reed* (App. Cas. 14).[4] In this case the question arose whether a provincial Act (43 & 44 Vict., c. 9), which imposed a duty of ten cents upon every exhibit filed in

[1] *Ante*, p. 94. [2] *Post*, p. 222. [3] *Post*, p. 230. [4] *Post*, p. 360.

Court, in any action depending therein, was valid. The Committee says : [1]

> " Now it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated, more or less scientifically, such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill and those who agree with him is less unfavourable to the appellant's arguments than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the ultimate incidence of the taxation as compared with the moment of time at which it is to be paid ; that a direct tax is—in the words which are printed here from Mr. Mill's book on political economy—' one which is demanded from the very persons who it is intended or desired should pay it.' And then the converse definition of indirect taxes is ' those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.'
>
> " Well, now, taking the first part of that definition, can it be said that a tax of this nature, a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice, is one which is demanded from the very persons who it is intended or desired should pay it ? It must be paid in the course of the legal proceeding, whether that is of a friendly or of a litigious nature. It must, unless in the case of the last and final proceeding after judgment, be paid when the ultimate termination of those proceedings is uncertain ; and from the very nature of such proceedings, until they terminate, as a rule, and speaking generally, the ultimate incidence of such a payment cannot be ascertained."

In this view the Committee held the legislation *ultra vires*.

Bank of Toronto v. *Lambe* (12 App. Cas. 575).[2] In the year 1882 the Quebec legislature passed a statute entitled, " An Act to impose certain direct taxes on certain commercial corporations," which enacted as follows, " every bank carrying on the business of banking in this province ; every insurance company accepting risks and transacting the business of insurance in this province ; every incorporated company carrying on any labour, trade, or business in this province ; and a number of other specified companies, shall annually pay the several taxes thereby imposed upon them." In the case of banks the tax imposed is a sum varying with the paid-up capital, and an additional sum for each office or place of business.

The Committee adopted John Stuart Mill's definition as follows :

> " Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired

[1] *Post*, p. 362. [2] *Post*, p. 378.

should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs."

"The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price." The Committee says:[1]

". . . Now whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec legislature must have intended and desired that the very corporations from whom the tax is demanded should pay and finally pay it. It is carefully designed for that purpose. It is not like a customs duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. . . .

". . . It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. . . .

". . . For these reasons their Lordships hold the tax to be direct taxation within class 2 of s. 92 of the Federation Act."

It was also contended that the legislation in question conflicted with the powers of the Dominion under 91 (15) Banking, but the Committee says, "this contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking or with the power of incorporating banks."

Brewers and Maltsters' Association of Ontario v. *The Attorney-General for Ontario* (1897), A. C. 231.[2] The Ontario Liquor Licence Act (R.S.O. C. 194) provided that no person should sell by wholesale or retail any spirituous fermented or other manufactured liquors, when sold for consumption in the province, without having first obtained a licence under the Act and pay the licence fee provided. The question referred to the Court of Appeal for Ontario was as to the validity of such legislation. The Court of Appeal held it to be valid, as also did the Judicial Committee, following *Bank of Toronto* v. *Lambe*.

Attorney-General of Canada v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (1898), A. C. 700;[3] discussed

[1] *Post*, p. 384. [2] *Post*, p. 529. [3] *Post*, p. 542.

ante, p. 87, where the question in issue was the right of fishing in the waters of Canada, the Committee held that the proprietory rights vested in the provinces at confederation were not affected by section 91 (12), Sea Coast and Inland Fisheries, which gave legislative jurisdiction only to the Dominion, nevertheless their Lordships say :[1]

"In addition, however, to the legislative power conferred by the twelfth item of s. 91, the third item of that section confers upon the Parliament of Canada the power of raising money by any mode or system of taxation. Their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of licence as a condition of the right to fish.

"It is true that, by virtue of s. 92, the Provincial Legislature may impose the obligation to obtain a licence in order to raise a revenue for provincial purposes, derogate from the taxing power of the Dominion Parliament to which they have already called attention.

"Their Lordships are quite sensible of the possible inconveniences, to which attention was called in the course of the arguments, which might arise from the exercise of the right of imposing taxation in respect of the same subject matter, and within the same area by different authorities. They have no doubt, however, that these would be obviated in practice by the good sense of the legislatures concerned."

Succession Duties Cases

Lambe v. *Manuel* (1903), A. C. 68.[2] The Succession Duty Act of Quebec provided as follows :

1191 B : "All transmissions owing to death of the property in, usufruct, or enjoyment of, movable and immovable property in the province shall be liable to the following taxes calculated upon the value of the property transmitted after deducting debts and charges existing at the time of the death."

"3. If the succession devolves to a stranger, 10 per cent."

1191 D. sub-s. 5. "No transfer of the properties of any estate or succession shall be valid, nor shall any title vest in any person, if the taxes payable under this section have not been paid ; and no executor, trustee, administrator, curator, heir or legatee shall consent to any transfers or payments of legacies unless the said duties have been paid."

A deceased person having his domicile in Ontario, owned shares in the capital stock of the Merchant's Bank whose head office was in Quebec, and also shares in the capital stock of the Bank of Commerce, which had its head office in Ontario, but a branch in

[1] *Post*, p. 554. [2] *Post*, p. 580.

Quebec with a separate register of stock for that province and the deceased's stock was in the Quebec register. He also had a mortgage debt secured upon lands in Quebec. The question involved was the application of the Quebec Succession Duties Act to the above described property. The Committee held, affirming the judgment below, that

"the taxes imposed by those Acts on movable property are imposed only on property which the successor claims under or by virtue of Quebec law, and that in the present case the several items in respect of which succession taxes are claimed form part of a succession devolving under the law of Ontario."

Woodruff v. *Attorney-General for Ontario* (1908), A. C. 508.[1]

It is said: "The question on these appeals is as to the right of the Attorney-General of the province of Ontario to demand payment of a tax, called in the Provincial Act (7), which imposed it 'succession duty' upon personal property locally situate outside the province and alleged by him to form part of the estate of a deceased domiciled inhabitant of the province, one Samuel De Veaux Woodruff. This question involves the consideration of two separate transactions, or sets of transactions, whereby the deceased divested himself or assumed to divest himself, of certain personal property locally situate in the State of New York.

". . . The pith of the matter seems to be that, the powers of the provincial legislature being strictly limited to 'direct taxation within the province' (British North America Act, 30 & 31 Vict., c. 3 s. 92, sub-s. 2), any attempt to levy a tax on property locally situate outside the province is beyond their competence."

The King v. *Lovitt* (1912), A. C. 212.[2]

Here it is said: "The question at issue is whether the defendants, who are the executors of the will of George H. Lovitt, deceased (domiciled in Nova Scotia), are liable to pay succession duties in respect of money which the testator had placed on special deposit in the St. John (New Brunswick) branch of the Bank of British North America.

". . . Broadly stated, s. 5 sub-ss. 1 and 2 seek to bring within the scope of succession duty:

"(*a*) All property situate within the province whether the deceased was domiciled there or not;

"(*b*) All property outside the province belonging to persons not domiciled therein; and

"(*c*) Even all property outside the province belonging to persons not domiciled therein, if such property be devised to a person resident therein.

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[1] *Post*, p. 662.

[2] *Post*, p. 700.

"We are here concerned only with (*a*), that is to say, the case of property said to be within the province, belonging to a person domiciled outside.

"The actual *situs* of the property is therefore the first question to be determined.

"The property consisted of simple contract debts, and as such could have no local situation other than the residence of the debtor where the assets to satisfy them would presumably be . . . .

". . . The defendants, however, contended that the situation of the property is to be determined, not by its actual locality, but according to the principle expressed in the maxim *mobilia sequuntur personam*. Personal property of a movable nature is considered, they say, to follow the person of the owner, and is, in contemplation of law, situate wherever he is domiciled. In this view the property was neither in London nor New Brunswick, but in Nova Scotia.

". . . When, therefore, it is said that *mobilia sequuntur personam*, all that is meant is that for certain limited purposes we deal with *mobilia* (or leave them to be dealt with) under the law governing their owner, as though they were situate in his country instead of ours, and, in return, foreign countries generally do the like with regard to English movables situate abroad.

"The defendants next say that even assuming the physical property, out of which the tax was to be paid, be taken as situate in New Brunswick, and not at the place of the owner's domicil, yet the true subject-matter of the tax was not that property, but the succession or title which accrued to the successor under the testator's will by virtue of the law of the testator's domicil. In that view the tax was laid on something not 'within the province,' and so was beyond the competence of the local legislature. On the basis of this contention the local legislature might tax the actual property, namely, the money comprised in the receipts, to any extent it pleased, but must not call the tax a succession duty taking place outside the province. The defendants, in this connection, cited the case of *Lambe* v. *Manuel* (1) where it was held that the taxes imposed on movable property by the Quebec Succession Duty Act, 1892, applied only to property claimed by virtue of Quebec law, and had no application to property forming part of a succession devolving under the law of Ontario. That case, however, turned expressly on the construction of the particular statute, which was not phrased so as to qualify the application of the principle *mobilia sequuntur personam*. It was drawn in the general and unrestricted terms which the courts have said must be read as subject to the limitation expressed by that principle.

"These provisions show that the Act under consideration assimilates the tax to the probate duty. It is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province, and, in the view of their Lordships, it is intended to

be a direct burden on that property, varying in amount according to the relationship of the successor to the testator."

Cotton v. *The King* (1914), A.C. 176.[1] The facts are stated in 30 *Times* Law Reports, 71, as follows :—

On April 11, 1902, Mrs. Charlotte L. Cotton, the wife of Mr. H. H. Cotton, died at Boston, in America, leaving an estate of the value of $359,441, of which $24,490 were in the province of Quebec, and the balance, consisting of bonds, debentures, industrial shares, and other securities, in America. The Government of the province claimed from Mr. Cotton, her husband and executor, $11,193 for succession duties at the statutory rate calculated on the whole net property passing under her will, and he paid it. It was admitted that her domicile and her husband's from 1902 until she died had been Cowansville, in Quebec. On December 26, 1906, Mr. Cotton died, leaving an estate valued at $341,385, of which $11,074 was in Quebec, and the remainder in America. The appellants were his executors. The Government of Quebec claimed $21,360 as succession duty, and that sum was paid. When Mrs. Cotton died the law in force in Quebec as to succession duty was as follows :

"Sect. 1191 (*b*). All transmissions, owing to death, of the property in usufruct or enjoyment of, movable and immovable property in the province shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death."

By a subsequent statute of 1906, which was in operation when the husband died, it was provided :

"Sect. 1191 (c). The word 'property' within the meaning of this section shall include all property, whether movable or immovable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all movables, wherever situate, of persons having their domicile (or residing) in the province of Quebec at the time of their death."

The appellants filed a petition of right in the Superior Court of Quebec, praying for a declaration that His Majesty, in the right of the Province of Quebec, was indebted to them in $31,492, with interest, on the ground that out of the sums previously paid that amount had been illegally claimed, it being contended that the province had no right to collect succession on any part of the estate outside the province, and that the statutes authorising them were unconstitutional null and void.

[1] *Post*, p. 788.

The Committee said that in regard to Mrs. Cotton's estate, the legislature, by the words of limitation contained in 55 and 56 Vict. c. 17, s. 1. Art 1191*b*, made it clear that it did not intend to tax the whole of the "property" of the deceased, but only those of her goods which were *situés dans la province*. It was no longer a question of the powers of the legislature. The definition prescribed that "property" includes movables "wherever situate," but the express language of the operative clause provided that of that "property" those portions only were taxed which were *biens situés dans la province*. On these grounds their Lordships were of opinion that the cross-appeal of the Crown must fail.

With respect to Mrs. Cotton's estate, which was governed by the provisions of the amendment of 1906 defining the word "property," the Committee said it had to decide whether an enactment in such a form would be within the powers of the provincial legislature, by reason of the taxation imposed by it, being direct taxation within the province to raise a revenue for provincial purposes, within the meaning of section 92 of the British North America Act, 1867.[1] After citing the cases of *The Attorney-General for Quebec* v. *Reed* (10 App. Cas. 141);[2] *The Bank of Toronto* v. *Lambe* (3 *The Times'* Law Reports, 472; 12 App. Cas. 575);[3] *The Brewers and Maltsters' Association of Ontario* v. *The Attorney-General for Ontario* (13 *The Times'* Law Reports, 197 (1897) A. C. 231;[4] all supporting Mr. Mill's definition of a direct tax—namely "one which is demanded from the very persons who it is intended or desired should pay it," and the converse definition of indirect taxes, "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another," the Committee also says "the whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he was not intended to bear, but was to obtain from other persons. This is not in return for services rendered by the Government, as in the cases where local probate has been necessary and fees have been charged in respect thereof. It is an instance of pure taxation, in which the payment is obtained from persons not intended to bear it within the meaning of the accepted definition above referred to, and their Lordships are therefore compelled to hold that the taxation is not 'direct taxation,' and that the enactment is therefore *ultra vires* on the part of the provincial government. On this ground, therefore, the appeal must be allowed."

[1] *Ante*, p. 57. [2] *Post*, p. 360. [3] *Post*, p. 378. [4] *Post*, p. 529.

S. 92 (4). The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provisional Officers.[1]

S. 92 (7). The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province other than Marine Hospitals.

S. 92 (8). Municipal Institutions in the Province.

In *Hodge* v. *The Queen* (9 App. Cas. 117 ;[2] discussed at p. 66) it was held that power to legislate respecting liquor licences was conferred by this section upon the province, but this view was negatived in *Attorney-General of Ontario* v. *Attorney-General of Canada* (1896), A. C. 348.[3]

S. 92 (9). Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

Attorney-General of Quebec v. *Queen Insurance Co.* (3 App. Cas. 1090).[4] In this case the Judicial Committee had to consider the validity of an Act of the province of Quebec which imposed a tax upon certain policies of assurance, and in doing so Sir George Jessel, Master of the Rolls, said :[5]

"The first power to be considered, though not the first in order in the Act of Parliament, is the ninth sub-section. The legislature of the province may exclusively make laws in relation to 'shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local, or municipal purposes.' The statute in question purports to be, on the face of it, in exercise of that power. It enacts that every assurer, except people carrying on marine insurance, shall be bound to take out a licence before the first day of May in each year, from the revenue officer of the district, and to remain continually under licence; it then, by the second section, enacts what the price of the licence is to be.

"Now, the first point which strikes their Lordships, and will strike every one, as regards this Licensing Act, is that it is a complete novelty. No such Licensing Act has ever been seen before. It purports to be a Licensing Act, but the licensee is not compelled to pay anything for the licence, and, what is more singular, is not compelled to take out the licence, because there is no penalty at all upon the licensee for not taking it up; and, further than that, if the policies are issued with the stamp, they appear to be valid, although

[1] *Post*, p. 120. [2] *Post*, p. 333. [3] *Ante*, p. 69. [4] *Post*, p. 222. [5] *Post*, p. 228.

no licence has been taken out at all. The result therefore is, that a licence is granted which there are no means of compelling the licensee to take, and which he pays nothing for if he does take; which is certainly a singular thing to be stated of a licence.

"The result therefore is this, that it is not in substance a licence Act at all. It is nothing more or less than a simple Stamp Act on policies, with provisions referring to a licence, because, it must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a licence."

Russell v. *The Queen* (7 App. Cas. 829).[1] In this case the question in issue was the validity of the Canada Temperance Act passed by the Dominion, which prohibited the sale of intoxicating liquors wherever brought into force. It was contended that this legislation was an invasion of the powers of the province under section 92 sub-s. 9, but the Committee said: [2]

"The act in question is not a fiscal law; it is not a law for raising revenue; on the contrary, the effect of it may be to destroy or diminish revenue; indeed it was a main objection to the Act that in the city of Fredericton it did in point of fact diminish the sources of municipal revenue. It is evident, therefore, that the matter of the Act is not within the class of subject No. 9, and consequently that it could not have been passed by the provincial legislature by virtue of any authority conferred upon it by that sub-section."

In *Attorney-General for Ontario* v. *Attorney-General for Canada* (1896), A. C. 348,[3] it was held that the provinces had power to pass a local prohibition law analogous to the Canada Temperance Act enacted by the Dominion, which had been held valid legislation in *Russell* v. *The Queen* (7 App. Cas. 829),[4] but Lord Watson there says: [5] "Their Lordships are likewise of opinion that section 92 sub-s. 9 does not give provincial legislatures any right to make laws for the abolition of the liquor traffic. It assigns to them "shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local, or municipal purposes." The power to legislate was by him rested upon sections 13 and 16 (p. 365).[6]

In *Brewers and Malsters' Association* v. *Attorney-General for Ontario* (1897), A. C. 231,[7] the Committee had to consider the validity of an Ontario statute, which required every brewer and distiller to obtain a licence thereunder to sell wholesale within the province, and it was held that the legislation was not only a direct

[1] *Post*, p. 310. [2] *Post*, p. 317. [3] *Post*, p. 481. [4] *Post*, p. 310. [5] *Post*, p. 494.
[6] *Ante*, p. 69. [7] *Post*, p. 529.

tax under section 92 sub-s. 2, but also was covered by section 92 sub-s. 9, the Committee saying : [1]

"Their Lordships do not doubt that general words may be restrained to things of the same kind as those particularised, but they are unable to see what is the genus which would include 'shop, saloon, tavern, and auctioneer licences, and which would exclude brewers and distillers' licences.'"

In *Attorney-General for Manitoba* v. *Manitoba License Holders' Association* (1902), A. C. 73,[2] this view was affirmed.

S. 92 (10). Local Works and Undertakings other than such as are of the following Classes :

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.

(*b*) Lines of steamship between the province and any British or foreign country.

(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces."

It has been pointed out (*supra*, p. 60) that the exceptions to local works and undertakings herein referred to properly belong to the enumerated sub-sections of section 91, and Lord Atkinson suggests in *Montreal* v. *Montreal Street Railway* (1912), A. C. 333,[3] that it should be treated as s. 91 sub-s. 29 or 29 (*a*). In the same case the Committee held that the Railway Act of Canada, which subjected a provincial railway not declared to be for the general advantage of Canada to certain provisions which related to *through traffic*, was *ultra vires*.

In *McGregor* v. *Esquimault and Nanaimo Railway* (1907), A. C. 462,[4] it was held that legislation respecting a local railway was properly enacted under the provisions of s. 91 sub-s. 10, the Committee saying : [5]

"On the constitutionality of the Act of 1904 and the power of the British Columbia Legislature to enact it, their Lordships see no reason for doubt. The legislature had the exclusive right to amend or repeal in whole or in part its own said statute of December 1883 (47 Vict., c. 14). And the Act relates, not to public property of the Dominion, as contended for by the respondents, but to property and civil rights in the province, and affects a work and undertaking

[1] *Post*, p. 534. [2] *Post*, p. 574. [3] *Post*, p. 719. [4] *Post*, p. 647. [5] *Post*, p. 652.

purely local (s. 92 sub-s. 10 of the British North America Act). This railway is the property of the respondents, and the said land had ceased to be the property of the Dominion in 1887 by the grant thereof to the respondents. By an Act passed in 1905 by the Dominion Parliament the legislative power over the company has since been transferred to the federal authority, but that Act, of course, has no application to this case."

S. 92 (11). The Incorporation of Companies with Provincial Objects.

The distribution between the Dominion and the provinces of the jurisdiction to incorporate companies was first fully considered in *Citizens' Insurance Company of Canada* v. *Parsons* (7 App. Cas. 96).[1] In answer to an argument suggested by one of the judges in the Supreme Court of Canada, that the appellant company having been incorporated by the Parliament of Canada under s. 91 sub-s. 2, the same authority had alone power to legislate with respect to the contracts of insurance, Sir Montague Smith said :[2]

" But, in the first place, it is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislature being ' the incorporation of companies with provincial objects, it follows that the incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada. But it by no means follows (unless indeed the view of the learned judge is right as to the scope of the words ' the regulation of trade and commerce ') that because the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion that it alone has the right to regulate its contracts in each of the provinces. Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in *mortmain*, it could scarcely be contended if such a company were to carry on business in a province where a law against holding land in *mortmain* prevailed (each province having exclusive legislative power over ' property and civil rights in the province ') that it could hold land in that province in contravention of the provincial legislation ; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body."

[1] *Post*, p. 267. [2] *Post*, p. 284.

Again, in *Dobie* v. *The Temporalities Board* (7 App. Cas. 136)[1] the question arose as to the power of the legislature of Quebec to repeal an Act of the Parliament of Canada, which created a corporation having its corporate existence in the provinces of Ontario and Quebec. The Committee said that such a corporation could not be held to be a company within the meaning of s. 92 sub-s. 11 ; " its objects are certainly not provincial." In the *Colonial Building and Investment Association Co.* v. *Attorney-General of Quebec* (9 App. Cas. 157)[2] the facts were as follows : The appellant company was incorporated by an Act of the Parliament of Canada (37 Vict., c. 103), and authorised, amongst other things, to acquire and hold real estate, and that the Chief Office should be in the city of Montreal, with power to establish branch agencies in London, New York, and in any city or town in Canada. A petition was filed in the Superior Court of Quebec, in which it was asked that the Company should be declared illegally incorporated and the association ordered to be dissolved ; the broad objection taken by the Attorney-General was that the statute incorporating the corporation was *ultra vires* of the Parliament of Canada. The Committee says :[3]

" It is asserted in the petition, and was argued in the Courts below, and at this bar, that inasmuch as the association had confined its operations to the province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and consequently that its incorporation belonged exclusively to the provincial legislature. But surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the association was originally within the legislative power of the Dominion Parliament. The company was incorporated with powers to carry on its business of various kinds throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers ; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation, nor warrant the judgment prayed for, viz. that the company be declared to be illegally constituted.

" It may be granted that, by the law of Quebec, corporations cannot acquire or hold lands without the consent of the Crown. This law was recognised by this Board, and held to apply to foreign corporations in the case of the *Chaudiere Gold Mining Company* v. *Desbarets* (L.R. 5 P.C. 277). It may also be assumed, for the purpose of this appeal, that the power to repeal or modify this law falls within No. 13 of section 92 of the British North America Act, viz.

[1] *Post*, p. 293. [2] *Post*, p. 349. [3] *Post*, p. 355.

'Property and civil rights within the province,' and belongs exclusively to the provincial legislature; so that the Dominion Parliament could not confer powers on the company to override it. But the powers found in the Act of incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the Crown. If that consent be obtained, a corporation does not infringe the provincial law of mortmain by acquiring and holding lands. What the Act of incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz. throughout the Dominion. Among other things, it has given to the association power to deal in lands and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of incorporation gives it capacity to do so."

In recent years the extent to which the operations of provincial companies can be carried on, and the power of a provincial legislature to restrict the operations of Dominion companies, have become of considerable importance, and the matter has been the subject of a reference to the Supreme Court of Canada, *in re* Companies Reference (48 S.C.R. p. 331). A minority of the Court, Fitzpatrick, C.J., and Davies, J., held that the limitation defined in the expression "provincial objects" in s. 92 sub.-s. 11 is territorial, and also has regard to the character of the powers which were conferred on companies locally incorporated; that a company incorporated by a provincial legislature has no power or capacity to do business outside of the limits of the incorporating province, but it may contract with parties outside these limits as to matters incidental to the exercise of its powers; that the legislature of a province has no power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province without obtaining a licence so to do from the provincial authorities and paying fees therefor, unless such licence is imposed in exercise of the taxing powers of the province.

The majority of the Court, however, expressed a contrary view, holding that "provincial legislation is a limitation not territorial, but has regard to the character of the powers only, and a provincial company, unless prevented by its charter, has capacity to carry on the business for which it was created in any foreign state or province whose laws permit it to do so. Dominion as well as

provincial companies must comply with the local laws of the province in which they desire to do business.[1]

S. 92 (12). The Solemnisation of Marriage in the Province.

Section 91 sub.-s. 26 gives legislative jurisdiction to the Parliament of Canada in marriage and divorce. This section and s. 92 sub.-s. 12 have to be harmonised. This was done by the Judicial Committee, *In re* Marriage Legislation in Canada (1912), A. C. 880,[2] where it is said (p. 887) : [3]

" Notwithstanding the able argument addressed to them, their Lordships have arrived at the conclusion that the jurisdiction of the Dominion Parliament does not, on the true construction of ss. 91 and 92, cover the whole field of validity. They consider that the provision in s. 92 conferring on the provincial legislature the exclusive power to make laws relating to the solemnisation of marriage in the province operates by way of exception to the powers conferred as regards marriage by s. 91, and enables the provincial legislature to enact conditions as to solemnisation which may affect the validity of the contract. There have doubtless been periods, as there have been and are countries, where the validity of the marriage depends on the bare contract of the parties without reference to any solemnity. But there are at least as many instances where the contrary doctrine has prevailed. The common law of England and the law of Quebec before confederation are conspicuous examples, which would naturally have been in the minds of those who inserted the words about solemnisation into the statute. *Prima facie* these words appear to their Lordships to import that the whole of what solemnisation ordinarily meant in the systems of law of the provinces of Canada at the time of confederation is intended to come within them, including conditions which affect validity. There is no greater difficulty in putting on the language of the statute this construction than there is in putting on it the alternative construction contended for. Both readings of the provision in s. 92 are in the nature of limitations of the effect of the words in s. 91, and there is, in their Lordships' opinion, no reason why what they consider to be the natural construction of the words 'solemnisation of marriage,' having regard to the law existing in Canada when the British North America was passed, should not prevail." [4]

S. 92 (13). Property and Civil Rights in the Province.

In *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96,[5] it is said :

" The main contention on the part of the respondent was that the Ontario Act in question had relation to matters coming within

[1] Vide *John Deere Plow Co.* v. *Wharton* and *Attorney General of Alberta* v. *Attorney General of Canada* recently decided by the Judicial Committee, discussed *addenda et corrigenda*. Cf. *Toronto* v. *Bell Telephone Co.* (1905 A.C. 52), *post*, p. 617. *La Compagnie Hydraulique* v. *Continental Heat Co.* (1909 A.C. 194), *post*, p. 672.

[2] *Post*, p. 749. [3] *Post*, p. 755. [4] Cf. *Watts* v. *Watts*, *post*, p. 667. [5] *Post*, p. 267.

the class of subjects described in No. 13 of s. 92, viz. 'Property and civil rights in the province.' The Act deals with policies of insurance entered into or in force in the province of Ontario for insuring property situated therein against fire, and prescribes certain conditions which are to form part of such contracts. These contracts, and the rights arising from them, it was argued, came legitimately within the class of subjects, 'property and civil rights.' The appellants, on the other hand, contended that civil rights meant only such rights as flowed from the law, and gave as an instance the status of persons. Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words 'civil rights.' The words are sufficiently large to embrace in their fair and ordinary meaning, rights arising from contract, and such rights are not included in express terms in any of the enumerated classes of subjects in s. 91.

"It is to be observed that the same words, 'civil rights,' are employed in the Act of 14 Geo. III, c. 83, which made provision for the government of the province of Quebec. Section 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words 'property' and 'civil rights' are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one."

The Committee accordingly held that legislation which prescribed certain conditions which should form part of all contracts of Fire Insurance entered into or in force in Ontario, were valid.

It is to be observed that it is property and civil rights in the province. When the property and civil rights are in two provinces, one province cannot legislate to affect such portion thereof as does not subsist in its province. This was held in *Dobie* v. *Temporalities Board* (7 App. Cas. 136).[1]

Again in *Russell* v. *The Queen* (7 App. Cas. 838),[2] where the matter in question was the power of the Dominion to pass a prohibitory liquor law for Canada, the Committee says:[3]

"Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects 'property and civil rights.' It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things, as well as intoxicating liquors, can, of course, be held as property, but

[1] *Post*, p. 293. [2] *Post*, p. 310. [3] *Post*, p. 318.

a law placing restrictions on their sale, custody, or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the ninety-second section. What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded. Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada.

"It was not, of course, contended for the appellant that the legislature of New Brunswick could have passed the Act in question, which embraces in its enactments all the provinces; nor was it denied, with respect to this last contention, that the Parliament of Canada might have passed an Act of the nature of that under discussion to take effect at the same time throughout the whole Dominion."

This view was repeated in *Hodge* v. *The Queen* (9 App. Cas. 117).[1]

The extent to which legislation under this sub-section may be validly passed so as to affect companies incorporated by the Dominion, is referred in *Colonial Building Association* v. *Attorney-General of Quebec* (9 A. C. 157)[2]; and *vide John Deere Plow Co.* v. *Wharton* in the Judicial Committee *addenda et corrigenda*, *ante*, p. xiii.

[1] *Post*, p. 333. [2] *Ante*, p. 109.

In *Tennant* v. *the Union Bank of Canada* (1894). A. C. 31.[1] discussed.[2] it was held that legislation by the Parliament of Canada under s. 91 sub-s. 15, banking would be valid although it interfered with property and civil rights in the province, and in *Attorney-General of Ontario* v. *Attorney-General of Canada* (1894), A. C. 189, discussed,[3] it was also held that a provincial statute relating to voluntary assignments for the benefit of creditors was merely ancillary to bankruptcy legislation under s. 91, sub-s. 21, and was within the competence of the provincial legislature so long as it did not conflict with any existing bankruptcy legislation of the Dominion Parliament.

In *Attorney-General of Ontario* v. *Attorney-General of Canada* (1896), A. C. 348,[4] Lord Watson, discussing the validity of the provincial liquor licence Act which provided for local prohibition, says:

> "The only enactments of s. 92 which appear to their Lordships to have any relation to the authority of provincial legislatures to make laws for the suppression of the liquor traffic are to be found in Nos. 13 and 16, which assign to their exclusive jurisdiction (1) 'property and civil rights in the province,' and (2) 'generally all matters of a merely local or private nature in the province.' A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which would be the subject-matter of the transactions if they were prohibited, and also the civil rights of persons in the province. It is not impossible that the vice of intemperance may prevail in particular localities within a province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor, a matter of a merely local or private nature, and therefore falling *prima facie* within No. 16. In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province where prohibition was urgently needed.
>
> "It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorised by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them."

But in *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A. C. 73.[5] discussed.[6] Lord Macnaghten

[1] *Post*, p. 433. [2] *Ante*, p. 88. [3] *Ante*, p. 78. [4] *Post*, p. 481.
[5] *Post*, p. 574. [6] *Ante*, p. 72.

says that sub-s. 13 of s. 92 was not applicable to this provincial liquor legislation, but only sub-s. 16.

In *Union Colliery Company* v. *Bryden* (1899), A. C. 580,[1] discussed,[2] it was held that a provincial statute prohibiting Chinamen from employment in underground coal workings, was *ultra vires* in view of s. 91 sub-s. 25 which gave exclusive legislative jurisdiction to the Dominion Parliament with regard to naturalisation and aliens, the Committee saying :[3]

> "There can be no doubt that, if s. 92 of the Act of 1867 had stood alone and had not been qualified by the provisions of the clause which precedes it, the provincial legislature of British Columbia would have had ample jurisdiction to enact s. 4 of the Coal Mines Regulation Act. That subject-matter of that enactment would clearly have been included in s. 92 sub-s. 10, which extends to provincial undertaking such as the coal mines of the appellant company. It would also have been included in s. 92 sub-s. 13, which embraces 'property and civil rights in the province.'"

In *Grand Trunk Railway Co.* v. *Attorney-General of Canada* (1907), A. C. 65,[4] discussed,[5] it is said :[6]

> "It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature—which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intra familiam*, than in the numerous cases which may be figured where the civil rights of outsiders may be affected. As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers."

In *McGregor* v. *Esquimault and Nanaimo Railway Co.* (1907), A. C. 462,[7] discussed,[8] it is pointed out that the local legislation in question, which directed that a grant in fee simple without any reservation as to mines and minerals, should be issued to certain settlers, and which included lands which had been granted to the respondent by the Dominion Government, did not relate to the public property of the Dominion, but to property and civil rights in the province.

In *Toronto* v. *Canadian Pacific Railway* (1908), A. C. 54 ;[9] discussed[10] where the question in issue was the power of the

[1] *Post*, p. 564. [2] *Ante*, p. 91. [3] *Post*, p. 568. [4] *Post*, p. 636. [5] *Ante*, p. 80.
[6] *Post*, p. 638. [7] *Post*, p. 647. [8] *Ante*, p. 107. [9] *Post*, p. 653. [10] *Ante*, p. 81.

Dominion Parliament to empower the Board of Railway Commissioners for Canada, to direct a municipality to bear part of the expense of certain measures to protect a railway crossing of a highway, the Committee says :[1]

> "The through railway is a subject-matter excepted out of the jurisdiction of the province, and there is no express provision in the British North America Act defining the jurisdiction of the province inconsistent with the right vested in the Dominion to provide for the safeguarding of the subject-matter thus excluded from the jurisdiction of the province. The jurisdiction conferred over property and civil rights in the province is quite consistent with a jurisdiction specially reserved to the Dominion in respect of a subject-matter not within the jurisdiction of the province. The rights in the highways conferred on the municipality by the sections of the Consolidated Municipal Act, 1903 (3 Edw. VII. c. 19 (Ontario)), cited in the appellants' case, do not, in their Lordships' opinion, help the appellants at all on the *ultra vires* point, though they bear strongly against them on the point that they are not 'persons interested.'"

The most recent decision of the Committee on the construction of the words "property and civil rights in the province," is contained in *The Royal Bank of Canada* v. *The King* (1903. A. C. 283).[2] the facts are stated as follows : This was an action brought by the Government of Alberta against the Royal Bank to recover $6,042,083 with interest, being the amount of the deposit held by the appellant bank. The Alberta and Great Waterways Railway was incorporated by the legislature of the province. The company was authorised to issue bonds, debentures, &c. By another Act the Government of Alberta was authorised to guarantee the payment of principal and interest of the bonds. The bonds were to be secured by mortgage to be made to trustees to be approved by the Lieutenant-Governor in Council. It was provided that all moneys realised by sale should be paid by purchaser into banks to be approved by the Lieutenant-Governor in Council, to a special account in the name of the treasurer of the province ; that the balance should be paid out to the company, or its nominee, in monthly payments as far as practicable as the construction proceeded. In 1910 a further Act was passed by the legislature which recited that the bonds had been sold, and the company had made default in construction of the road and in payment of interest of the bonds, and proceeded to declare that the money received from the sale of the bonds formed part of the General Revenue Fund of the province of Alberta, free of any claim of the Alberta and Great Waterways Railway Company,

[1] *Post*, p. 657. [2] *Post*, p. 756.

and should be paid over by the bank to the treasurer of the province. . . . In an action against the bank it was contended that this legislation was *ultra vires* the Alberta Legislature because (1) it affected property and civil rights outside the province; (2) it was essentially a banking Act within the exclusive legislative authority of the Dominion; (3) it was confiscatory, and attempted to raise revenue in a manner other than by direct taxation within the province.

The money received from the sale of the bonds was received by the bank in New York and credited to its special account. The bank had its head office in Montreal. No money was paid into the branch office in Alberta, but the general manager at Montreal arranged for the proper credit of the special account. None of this money was paid out pursuant to the legislation, but the bank made advances to the Construction Company, which had commenced preliminary work and took as security an assignment on the proceeds of the bond issue. The Privy Council said that the legislature had power to repeal any statute it had passed, but the legislation in question was to change the position of the province under its scheme to carry out which the bondholders had subscribed their money, and held that where the scheme under which bondholders had paid their money failed, the lenders in London had the right to claim from the bank at the head office in Montreal a return of the money which they had advanced solely for the purpose which had ceased to exist. This was a civil right outside the province, and the legislature could not legislate in derogation of that right.

In a recent reference made by the Governor-General in Council to the Supreme Court of Canada (48 S.C.R. 260), asking the opinion of the Court with respect to the validity of a Dominion Act which required all insurance companies carrying on business outside the limits of the incorporating province to obtain a licence. The majority of the Court held that such legislation was *ultra vires*. An appeal to the Judicial Committee is now pending.[1]

S. 92 (14). The Administration of Justice in the Province, including the Constitution, Maintenance, and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

In *Valin* v. *Langlois* (5 App. Cas. 115)[2] the question for determination was the power of the Dominion Parliament to enact the

[1] Cf. *John Deere, Plow & Co.* v. *Wharton* and *Attorney General of Alberta* v. *Attorney General of Canada*, decided in October 1914, discussed *addenda et corrigenda, ante*, pp. xiii–xiv.

[2] *Post*, p. 247.

Controverted Election Act,[1] which, amongst other things, conferred upon provincial Courts of Justice jurisdiction to try controverted election cases arising out of the election of members to the Dominion Parliament. Section 41 of the B.N.A. Act reads as follows:

"Until the Parliament of Canada otherwise provides, all laws in force in the several provinces at the Union relative to the following matters or any of them, namely, The qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly in the several provinces, the voters at elections of such members, the oaths to be taken by voters, the returning officers, their powers and duties, the proceedings at elections, the periods during which elections may be continued, the trial of controverted elections, and proceedings incident thereto, the vacating of seats of members, and the execution of new writs in case of seats vacated otherwise than by dissolution, shall respectively apply to elections of members to serve in the House of Commons for the same several provinces."

As to this the Committee says:[2]

"The controversy is solely whether the power which that Parliament possesses of making provision for the mode of determining such questions has been competently or incompetently exercised."

"The only ground upon which it is alleged to have been incompletely exercised is that by the 91st and 92nd clauses of the Act of 1867, which distribute legislative powers between the provincial and Dominion legislatures, the Dominion Parliament is excluded from the power of legislating on any matters coming within those classes of subjects which are assigned exclusively to the legislatures of the provinces. One of those classes of subjects is defined in these words by the 14th sub-section of the 92nd clause: 'The administration of justice in the province, including the constitution, maintenance, and organisation of provincial courts both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.' The argument, and the sole argument, which has been offered to their Lordships to induce them to come to the conclusion that there is here a serious question to be determined, is that the Act of 1874, the validity of which is challenged, contravenes that particular provision of the 92nd section, which exclusively assigns to the Provincial Legislatures the power of legislating for the administration of justice in the provinces, including the constitution, maintenance, and organisation of provincial Courts of civil and criminal jurisdiction, and including procedure in civil (not in criminal) matters in those Courts. Now if their Lordships had for the first time, and without any assistance from anything which has

[1] 37 Vic. c. 10 (1874). [2] *Post*, p. 249.

taken place in the colony, to apply their minds to that matter, and even if the 41st section were not in the Act, it would not be quite plain to them that the transfer of the jurisdiction to determine upon the right to seats in the Canadian Legislature—a thing which has been always done, not by Courts of justice, but otherwise—would come within the natural import of those general words: 'The administration of justice in the province, and the constitution, maintenance, and organisation of provincial courts, and procedure in civil matters in those courts.' But one thing at least is clear, that those words do not point expressly or by any necessary implication to the particular subject of election petitions; and when we find in the same Act another clause which deals expressly with those petitions there is not the smallest difficulty in taking the two clauses together and placing upon them both a consistent construction. That other clause, the 41st, expressly says that the old mode of determining this class of questions was to continue until the Parliament of *Canada* should otherwise provide. It was therefore the Parliament of *Canada* which was otherwise to provide. It did otherwise provide by the Act of 1873, which Act it afterwards altered, and then passed the Act now in question."

In *Attorney-General of Quebec* v. *Reed* (10 App. Cas. 141;[1] discussed *supra*, p. 97), the question in issue was the validity of a provincial Act, which imposed a duty of ten cents upon every exhibit filed in Court in any action depending therein. It was contended this was warranted by virtue of the provisions of the sub-section now under discussion. As to this, Lord Chancellor Selborne, for the Committee, said:[2]

"That point, which is the main point, and was felt to be so by Mr. Davey in his very able and clear argument, being disposed of, the next question, upon the terms of the same section of the same Act, is that which arises under sub-s. 14. One of the things which are to be within the powers of the provincial legislatures—within their exclusive powers—is the administration of justice in the province, including the constitution, maintenance, and organisation of provincial Courts, and including the procedure in civil matters in the Courts. Now it is not necessary for their Lordships to determine whether, if a special fund had been created by a provincial Act for the maintenance of the administration of justice in the provincial Courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been applicable. That may be an important question which may be considered in any case in which it may arise; but it does not arise in this case. This Act does not relate

[1] *Post*, p. 360. [2] *Post*, p. 363.

to the administration of justice in the province; it does not provide in any way, directly or indirectly, for the maintenance of the provincial Courts; it does not purport to be made under that power, or for the performance of that duty. The subject of taxation, indeed, is a matter of procedure in the provincial Courts, but that is all.

"The fund to be raised by that taxation is carried to the purposes mentioned in the second sub-section: it is made part of the general consolidated revenue of the province. It therefore is precisely within the words 'taxation in order to the raising of a revenue for provincial purposes.' If it should greatly exceed the cost of the administration of justice, still it is to be raised and applied to general provincial purposes, and it is not more specially applicable for the administration of justice than any other part of the general provincial revenue.

"Their Lordships therefore think that it cannot be justified under the 14th sub-section."

In *Attorney-General of Canada* v. *Attorney-General of Ontario* (1898), A. C. 247,[1] a reference was made by the Lieutenant-Governor of Ontario to the Court of Appeal as to whether it was lawful for him in the name of Her Majesty, under the seal of the province, to appoint Queen's Counsel. As to this, Lord Watson said:[2]

"That is a question which can only be solved by reference to the provisions of the Imperial Act of 1867; and there are three of the enactments of s. 92 which appear to their Lordships to have an immediate bearing upon it. The first head of that clause gives to the legislature of each province exclusive authority to make laws from time to time for the amendment of the constitution of the province, 'except as regards the office of Lieutenant-Governor.' By sub-s. 4 of the same clause, 'the establishment and tenure of provincial offices, and the payment of provincial officers.' Again by the 14th head, the legislature is empowered to make laws in relation to the administration of justice in the province, 'including the constitution, maintenance, and organisation of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts.'

"By the combined effect of these enactments it is entirely within the discretion of the provincial legislature to determine by what officers of the Crown, or, in other words, the executive government of the province, shall be represented in its courts of law or elsewhere, and to define by Act of Parliament the duties, whether substantial or honorary, which are to be incumbent upon these officers, and the rights and privileges which they are to enjoy."

[1] *Post*, p. 535. [2] *Post*, p. 540.

S. 92 (15). The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in Relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

In *Hodge* v. *The Queen*, 9 App. Cas. 117,[1] discussed,[2] where the question was the validity of a provincial statute, which provided for the appointment of a Board of Licence Commissioners which should pass regulations for defining the conditions and qualifications requisite to obtain tavern and shop licences, the Board was authorised to impose penalties for infractions of its provisions. The Committee held (p. 131) that this could be done under the present sub-section.

In *Russell* v. *The Queen* (7 App. Cas. 829; *infra*, p. 310), where the validity of the Canada Temperance Act was in question, which prohibited within the local area the sale of intoxicating liquor, and subject to fine and imprisonment it was argued that if the Act related to criminal law it was provincial criminal law and referred to this section; as to this the Committee said the argument would be well founded if the principal matter of the Act could be brought within s. 92, but this had not been done.

S. 92 (16). Generally all Matters of a merely Local or Private Nature in the Province.

In *L'Union St. Jacques de Montréal* v. *Bélisle* (L.R., 6 P.C. 31),[3] discussed,[4] the validity of a provincial Act, that purported to relieve by legislation a society which appeared to be in a state of extreme financial embarrassment, was in question. It was claimed by the plaintiff that legislation was *ultra vires*, the subject being wholly within the jurisdiction of the Parliament of Canada. As to this, Lord-Chancellor Selborne said:[5]

> "There are certain other matters, not only not reserved for the Dominion Parliament, but assigned to the exclusive power and competency of the provincial legislature in each province. Among those the last is thus expressed: 'Generally all matters of a merely local or private nature in the province.' If there is nothing to control that in the 91st section, it would seem manifest that the subject-matter of this Act, the 33 Vict., c. 58, is a matter of a merely local or private nature in the province, because it relates to a benevolent or benefit society incorporated in the city of *Montreal* within the province, which appears to consist exclusively of members who would be subject *prima facie* to the control of the provincial legislature."

[1] *Post*, p. 333. [2] *Ante*, p. 66. [3] *Post*, p. 206. [4] *Post*, p. 85. [5] *Ante*, p. 209.

In the case of *Russell* v. *The Queen* (7 App. Cas. 829),[1] it was contended that the provisions of the Dominion Act fell within this sub-section, but the Committee negatived this view. The Committee saying (*infra*, p. 320):

"It was not, of course, contended for the appellant that the legislature of New Brunswick could have passed the Act in question, which embraces in its enactments all the provinces; nor was it denied, with respect to this last contention, that the Parliament of Canada might have passed an Act of the nature of that under discussion to take effect at the same time throughout the whole Dominion. Their Lordships understand the contention to be that, at least in the absence of a general law of the Parliament of Canada, the provinces might have passed a local law of a like kind, each for its own province, and that, as the prohibitory and penal parts of the Act in question were to come into force in those counties and cities only in which it was adopted in the manner prescribed, or, as it was said, 'by local option,' the legislation was in effect, and on its face, upon a matter of a merely local nature.

"The judgment of Allen, C.J., delivered in the Supreme Court of the province of New Brunswick in the case of *Barker* v. *City of Fredericton*, which was adverse to the validity of the Act in question, appears to have been founded upon this view of its enactments. The learned Chief Justice says: 'Had this Act prohibited the sale of liquor, instead of merely restricting and regulating it, I should have had no doubt about the power of the Parliament to pass such an Act: but I think an Act which in effect authorises the inhabitants of each town or parish to regulate the sale of liquor, and to direct for whom, for what purposes, and under what conditions spirituous liquors may be sold therein, deals with matters of a merely local nature, which, by the terms of the 16th sub-section of s. 92 of the British North America Act, are within the exclusive control of the local legislature.

"Their Lordships cannot concur in this view. The declared object of Parliament in passing the Act is that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors, with a view to promote temperance in the Dominion. Parliament does not treat the promotion of temperance as desirable in one province more than in another, but as desirable everywhere throughout the Dominion. The Act, as soon as it was passed, became a law for the whole Dominion, and the enactments of the first part, relating to the machinery for bringing the second part into force, took effect and might be put in motion at once and everywhere within it. It is true that the prohibitory and penal parts of the Act are only to come into force in any county or city upon the adoption of a petition to that effect by a majority of electors, but this conditional application of these parts of the Act

[1] *Post*, p. 310.

does not convert the Act itself into legislation in relation to a merely local matter. The objects and scope of the legislation are still general, viz. to promote temperance by means of a uniform law throughout the Dominion.

"The manner of bringing the prohibitions and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character."

It has been pointed out[1] the Committee says, in *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902) A. C. 73,[2] that the legislation for local suppression of the liquor traffic falls under this sub-section and not under s. 92 sub-s. 13. *vide* p. 61 *supra*.

PROPERTY AND RIGHTS

Part VIII of the B.N.A. Act, which includes the following sections, deals with the subject of revenues, debts, and assets of the Dominion and the provinces. From time to time disputes have arisen with respect to these matters, which have necessitated an appeal to the King in Council.

"102. All duties and revenues, over which the respective legislatures of Canada, Nova Scotia, and New Brunswick, before and at the Union, had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada, in the manner and subject to the charges in this Act provided."

"108. The public works and property of each province, enumerated in the Third Schedule to this Act, shall be the property of Canada.

"109. All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same."

"111. Canada shall be liable for the debts and liabilities of each province existing at the Union.

"112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the Union sixty-two million five hundred thousand

[1] *Ante*, p. 71. [2] *Post*, p. 574.

dollars, and shall be charged with interest at the rate of five per centum per annum thereon."

"117. The several provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country."

"126. Such portions of the duties and revenues over which the respective legislatures of Canada, Nova Scotia, and New Brunswick had before the Union power of appropriation as are by this Act reserved to the respective governments or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each province form one Consolidated Revenue Fund to be appropriated for the public service of the province."

PROPERTY AND RIGHTS IN VIRTUE OF THE PREROGATIVE RIGHTS AND REVENUES OF THE CROWN

Escheats

Escheats formed one branch of the Crown's ordinary revenue in England from the earliest times. The term is applied to the case of the owner of an estate in fee simple dying without having disposed of it, and having no lawful heir to take it by descent. Such an instance arose in the province of Ontario (*Attorney-General of Ontario* v. *Mercer*, 8 App. Cas. 767),[1] and the question was, did the estate revert to the Crown in right of the province under the provision of the B.N.A. Act. The Committee held that:

"At the date of passing the British North America Act, 1867, the revenue arising from all escheats to the Crown within the then province of Canada was subject to the disposal and appropriation of the Canadian legislature and not of the Crown. Although s. 102 of the Act imposed upon the Dominion the charge of the general public revenue as then existing of the provinces; yet by s. 109 the casual revenue arising from lands escheated to the Crown after the Union was reserved to the provinces—the words 'lands, mines, minerals, and royalties,' therein including, according to their true construction, royalties in respect of lands, such as escheats."

The Crown as a Privileged Creditor

It was always a principle of English law that the Crown might take in execution the body, land, and goods of its debtor. The

[1] *Post*, p. 322.

writ of extent was the process by which this right of the Crown was enforced. With respect to the powers of extent, in case the defendant's goods had been actually taken in execution at the suit of a subject, the statute 33 Hen. VIII. c. 39, s. 74, enacted that the King's suit should be preferred before the suit of any person or persons, and he should have first execution against the defendant or defendants, so long as the King's suit was commenced before judgment was given for such other person or persons. The general rule at common law was that even a prior seizure under a writ of *fieri facias* did not operate or render the execution complete against an extent, though a sale before the fiat or teste of the extent would secure the subject's right.

It has been held (*in re* Henley & Co., L.R. Ch.D. 469) that in a winding-up proceeding in England under the Companies' Act the Crown was not bound by statute, except specially mentioned, and that, in the administration of an insolvent company, when the rights of a subject came into competition with the rights of the Crown, the latter prevailed by virtue of the prerogative.

In the *Exchange Bank* v. *The Queen* (11 App. Cas. 157), it was held that in the liquidation proceedings respecting an insolvent bank taken in the province of Quebec under the article of the Civil Code, the Crown was bound by the Codes, which deal extensively with the subject of priorities, and that as the French law gave to the King no priority with respect to debts of the character of those in question in the appeal, the Crown was not entitled to priority in this case (vide *Liquidators of Maritime Bank* v. *Receiver-General of New Brunswick* (1892), A. C. 367 [1]).

Precious Metals

Mines of gold and silver have always been the property of the King by virtue of his prerogative; a grant of lands, therefore, from the Crown in which these precious metals are not expressly mentioned as the subject-matter of grant must be read as if they were excluded therefrom.

Attorney-General of British Columbia v. *Attorney-General of Canada* (14 App. Cas. 298).[2] As a consideration for the construction of a railway to connect the seaboard of British Columbia with the railway system of Canada, the province agreed to convey to the Dominion "the public lands along the railway wherever it might be finally located to a width of twenty miles on each side of

[1] *Post*, p. 128. [2] *Post*, p. 403.

the line." The question arose whether the words "public lands" included the precious metals gold and silver, the Committee said:

> "It therefore appears to their Lordships that a conveyance by the province of 'public lands,' which is, in substance, an assignment of its rights to appropriate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown."

The Committee also in this case determined the extent of the property rights which the Dominion acquired by the grant, saying:

> "Leaving the precious metals out of view for the present, it seems clear that the only 'conveyance' contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues. It was neither intended that the lands should be taken out of the provinces, nor that the Dominion Government should occupy the position of a freeholder within the province. The object of the Dominion Government was to recoup the cost of constructing the railway by selling the land to settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position as if it had been settled by the provincial Government in the ordinary course of its administration. That was apparently the consideration which led to the insertion, in the agreement of 1883, of the condition that the Government of Canada should offer the land for sale, on liberal terms, with all convenient speed."

The Committee also construe s. 109 of the Act above set out, saying:

> "Their Lordships do not think it admits of doubt, and it was not disputed at the bar, that s. 109 of the British North America Act must now be read as if British Columbia was one of the provinces therein enumerated. With that alteration it enacts that 'all lands, mines, minerals, and royalties,' which belonged to British Columbia at the time of the Union, shall for the future belong to that province and not to the Dominion. In order to construe the exception from that enactment, which is created by the 11th article of Union, it is necessary to ascertain what is comprehended in each of the words of the enumeration, and particularly in the word 'royalties.' The scope and meaning of that term, as it occurs in s. 109, underwent careful consideration in the case of *Attorney-General of Ontario* v. *Mercer*,[1] which was appealed to this Board by the Dominion Government, in name of the defendant Mercer. In that case their Lordships were of opinion that the mention of 'mines and minerals' in the context was not enough to deprive the word 'royalties' of

[1] *Post*, p. 322.

what would otherwise have been its proper force. The Earl of Selborne, in delivering the judgment of the Board, said: 'It appears, however, to their Lordships to be a fallacy to assume that because the word 'royalties' in this context would not be regarded as inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated, lands as well as mines and minerals—even as to mines and minerals it here necessarily signifies rights belonging to the Crown *jure coronæ*.

"It is not necessary for the purposes of this appeal to consider whether the expression 'royalties,' as used in s. 109, includes *jura regalia* other than those connected with lands, and mines and minerals. *Attorney-General of Ontario* v. *Mercer* is an authority to the effect, that within the meaning of the clause the word 'royalties' comprehends, at least, all revenues arising from the prerogative rights of the Crown in connection with 'lands, mines, and minerals.' The exception created by the 11th article of Union, from the rights specially assigned to the province by s. 109, is of 'lands' merely. The expression 'lands' in that article admittedly carries with it the baser metals, that is to say, 'mines' and 'minerals,' in the sense of s. 109. Mines and minerals, in that sense, are incidents of land, and, as such, have been invariably granted, in accordance with the uniform course of provincial legislation, to settlers who purchased land in British Columbia. But *jura regalia* are not accessories of land; and their Lordships are of opinion that the rights to which the Dominion Government became entitled under the 11th Article did not, to any extent, derogate from the provincial right to 'royalties' connected with mines and minerals under s. 109 of the British North America Act."

It was held in the *Calgary and Edmonton Railway Company* v. *The King* (1904), A. C. 765, that the appellants being entitled under a statute of Canada and an Order in Council, to grants of Dominion lands as a subsidy in aid of construction of their railway, they were entitled to grants without any reservation by the Crown of mines and minerals, except gold and silver.

Esquimault Railway Company v. *Bainbridge* (1896), A. C. 561.[1] In the statute of British Columbia passed pursuant to the articles of the Union above referred to, which conveyed property of the province to the Dominion as a consideration for the construction of a railway to connect the provincial tidal waters with the Western railway system of Canada, the following language is used: "S. 2. From and after the passing of this Act there shall be and

[1] *Post*, p. 501.

there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust to be appropriated as the Dominion Government may deem advisable, the *public lands* along the line of the railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line as provided in the rider in s. 11, admitting the province of British Columbia into confederation; and s. 3 provides as follows: "There is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of a railway between Esquimault and Nanaimo"; then follows a description of an area of land in Vancouver Island, and concludes, "and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder." Subsequently the Dominion granted to the appellant company all the lands and minerals on Vancouver Island which were included in s. 3 of the British Columbia statute above set out. It was contended in the present case that only s. 2 above was under consideration in the next preceding case, and that by virtue of s. 3 the present appellants obtained a grant of the precious metals. As to this the Committee say (p. 566):[1]

> "The words relied on are, 'including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon, therein, and thereunder.' The only expressions occurring in that enumeration which can possibly aid the argument of the appellant company are 'mines, minerals, and substances.' Not one of these expressions can be rightly described as precise, or, in other words, as necessarily including the precious metals. According to the usual rule observed in the construction of the concluding and general items of a detailed enumeration, they may be held to signify *alia similia* with the minerals or substances previously enumerated; and it appears to their Lordships to be sufficient for the decision of the present case that they may be aptly limited to minerals or substances which are incidents of the land, and pass with the freehold."

Liquidators of the Maritime Bank v. *Receiver-General* (1892), A. C. 437.[2] In this case also the question of the Crown's priority as simple contract creditors came up for consideration in connection with the liquidation of the Maritime Bank. The Crown's right was the Crown in right of the province and not of the

[1] *Post*, p. 505. [2] *Post*, p. 414.

Dominion, which was the case in the *Exchange Bank* v. *The Queen* just discussed.[1] It was contended on behalf of the liquidator that the effect of the B.N.A. Act was to sever all connection between the Crown and the provinces; to make the Government of the Dominion the only Government of Her Majesty in Canada and to reduce the provinces to the rank of independent municipal institutions, and that therefore there was no prerogative right in favour of the Crown involved. This view was not sustained by the Judicial Committee, and it was held (approving of *Hodge* v. *The Queen*, 9 App. Cas. 117)[2] that within the limits prescribed by s. 92, the province possessed authority as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed and could bestow. The Committee also again deal with the construction to be placed upon ss. 109 and 126, saying (p. 444):[3]

> "The whole revenues reserved to the provinces for the purposes of provincial government are specified in ss. 109 and 126 of the Act. The first of these clauses deals with 'all lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union,' which it declares 'shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise.' If the Act had operated such a severance between the Crown and the provinces, as the appellants suggest, the declaration that these territorial revenues should 'belong' to the provinces would hardly have been consistent with their remaining vested in the Crown. Yet, in *Attorney-General of Ontario* v. *Mercer; St. Catherine's Milling and Lumber Co.* v. *The Queen;* and *Attorney-General of British Columbia* v. *Attorney-General of Canada*, their Lordships expressly held that all the subjects described in s. 109, and all revenues derived from these subjects, continued to be vested in Her Majesty as the sovereign head of each province. S. 126, which embraces provincial revenues other than those arising from territorial sources, and includes all duties and revenues raised by the provinces in accordance with the provisions of the Act, is expressed in language which favours the right of the Crown, because it describes the interest of the provinces as a right of appropriation to the public service."

Fountain of Honour

The King is the fountain of honour, of office, and privilege. In *Attorney-General of Canada* v. *Attorney-General of Ontario* (1898), A. C. 247;[4] it was determined that the Lieutenant-Governor of the province could confer precedence by patents

[1] *Ante*, p. 125. [2] *Post*, p. 333. [3] *Post*, p. 419. [4] *Ante*, p. 120.

upon such members of the bar of the province as he might think fit to select. It was not disputed that the Governor-General had similar powers with respect to Dominion Courts.

Indian Lands

The sections of the Act now under consideration were fully discussed in the following cases relating to Indian lands.

In *St. Catherine's Milling and Lumber Co.* v. *The Queen* (14 App. Cas. 46),[1] the Committee says:

"On the 3rd of October 1873, a formal treaty or contract was concluded between commissioners appointed by the Government of the Dominion of Canada, on behalf of Her Majesty the Queen, of the one part, and a number of chiefs and headmen duly chosen to represent the Salteaus tribe of Ojibbeway Indians, of the other part by which the latter for certain considerations, released and surrendered to the Government of the Dominion, for Her Majesty and her successors, the whole right and title of the Indian inhabitants whom they represented, to a tract of country upwards of 50,000 square miles in extent. By an article of the treaty it is stipulated that, subject to such regulations as may be made by the Dominion Government, the Indians are to have right to pursue their avocations of hunting and fishing throughout the surrendered territory, with the exception of those portions of it which may, from time to time, be required or taken up for settlement, mining, lumbering, or other purposes.

"Of the territory thus ceded to the Crown, an area of not less than 32,000 square miles is situated within the boundaries of the province of Ontario; and, with respect to that area, a controversy has arisen between the Dominion and Ontario, each of them maintaining that the legal effect of extinguishing the Indian title has been to transmit to itself the entire beneficial interest of the lands, as now vested in the Crown, freed from incumbrance of any kind save the qualified privilege of hunting and fishing mentioned in the treaty.

"The Act of 1867, which created the Federal Government, repealed the Act of 1840, and restored the Upper and Lower Canadas to the condition of separate provinces, under the titles of Ontario and Quebec, due provision being made (s. 142) for the division between them of the property and assets of the united province, with the exception of certain items specified in the fourth schedule, which are still held by them jointly. The Act also contains careful provisions for the distribution of legislative powers and of revenues and assets between the respective provinces included in the Union, on the one hand, and the Dominion, on the other. The conflicting claims to the ceded territory maintained by the Dominion and the

[1] *Post*, p. 390.

province of Ontario are wholly dependent upon these statutory provisions. In construing these enactments it must always be kept in view that, wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use, or its proceeds, has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown. . . ."

"Section 109 provides that 'all lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick, at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the provinces in the same.' In connection with this clause it may be observed that, by s. 117, it is declared that the provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. A different form of expression is used to define the subject-matter of the first exception, and the property which is directly appropriated to the provinces; but it hardly admits of doubt that the interests in land, mines, minerals, and royalties, which by s. 109 are declared to belong to the provinces, include, if they are not identical with, the 'duties and revenues' first excepted in s. 102.

"The enactments of s. 109 are, in the opinion of their Lordships, sufficient to give each province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the Union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under s. 108, or might assume for the purposes specified in s. 117. Its legal effect is to exclude from the 'duties and revenues' appropriated to the Dominion all the ordinary territoral revenues of the Crown arising within the provinces."

Attorney-General of Canada v. *Attorney-General of Ontario* (1897), A. C. 199.[1]

"By treaties in 1850 the Governor of Canada, as representing the Crown and the Provincial Government, obtained the cession from the Ojibbeway Indians of the lands occupied as Indian reserves, the beneficial interest therein passing to the provincial government, together with the liability to pay to the Indians certain perpetual annuities:

"It was held that these lands being within the limits of the province of Ontario, created by the British North America Act, 1867,

[1] *Post*, p. 517.

the beneficial interest therein vested under s. 109 in that province.

"That the perpetual annuities having been capitalised on the basis of the amounts specified in the treaties, the Dominion assumed liability in respect thereof under s. 111. Thereafter the amounts of these annuities were increased according to the treaties:

"That liability for these increased amounts was not so attached to the ceded lands and their proceeds as to form a charge thereon in the hands of the province, under s. 109. They must be paid by the Dominion, with recourse to the provinces of Ontario and Quebec conjointly, under ss. 111 and 112; in the same manner as the original annuities."

Ontario Mining Company v. *Seybold* (1903, A. C.) 73.[1]

"It was held that lands in Ontario surrendered by the Indians by the treaty of 1873 belong in full beneficial interest to the Crown as representing the province, subject only to certain privileges of the Indians reserved by the treaty. The Crown can only dispose thereof on the advice of the ministers of the province and under the seal of the province."

"The Dominion Government having purported, without the consent of the province, to appropriate part of the surrendered lands under its own seal as a reserve for the Indians in accordance with the said treaty:

"It was held that this was *ultra vires* the Dominion, which had by s. 91 of the British North America Act of 1867 exclusive legislative authority over the lands in question, but had no proprietary rights therein."

Canada v. *Ontario* (1910), A. C. 637.[2]

"By a treaty dated October 3, 1873, the Dominion Government, acting in the interests of the Dominion as a whole, secured to the Salteaux tribe of the Ojibeway Indians certain payments and other rights, at the same time extinguishing by consent their interest over a large tract of land about 50,000 square miles in extent, the greater part of which was subsequently ascertained to lie within the boundaries of the province of Ontario. It having been decided that the release of the Indian interest effected by the treaty enured to the benefit of Ontario, the Dominion Government sued in the Exchequer Court for a declaration that it was entitled to recover from and be paid by the province of Ontario a proper proportion of annuities and other moneys paid and payable under the treaty:

"It was held, affirming the judgment of the Supreme Court, that, having regard to the jurisdiction conferred upon the Exchequer Court, the action must be dismissed as unsustainable on any principle of law. In making the treaty, although it resulted in direct

[1] *Post*, p. 584. [2] *Post*, p. 676.

advantage to the province, the Dominion Government did not act as agent or trustee for the province or with its consent, or for the benefit of the lands, but with a view to great national interests—that is, for distinct and important interests of their own—in pursuance of powers derived from the British North America Act, 1867."

Fisheries, Foreshores, and Harbours

It has already been pointed out [1] that in construing the B.N.A. Act care must be taken not to confuse *legislative jurisdiction* with *proprietary rights*. This is specially applicable to s. 91. By sub-s. 24 of this section, legislative jurisdiction is conferred upon the Dominion over Indians and lands reserved for the Indians. It was contended by the Dominion, in the case of the *St. Catherine's Milling and Lumber Co.* v. *The Queen* (14 App. Cas. 46 ; discussed),[2] that the effect of a surrender of lands by Indians to the Queen pursuant to a treaty concluded by Commissioners of the Government of Canada and the Chief of a certain Indian tribe, was to pass the beneficial interest in these lands to the Dominion of Canada ; but this view was negatived by the Judicial Committee, and it was said : [3]

"Their Lordships are, however, unable to assent to the argument for the Dominion founded on s. 91 sub-s. 24. There can be no *a priori* probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion, is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title."

This distinction between *legislative jurisdiction* and *proprietary rights* was most clearly expressed by Lord Herschell in pronouncing the judgment of the Judicial Committee in the appeal of the *Attorney-General of Canada* v. *Attorney-General of Ontario* (1898), A. C. 700,[4] where he says :

"It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is

[1] *Ante*, p. 54. [2] *Ante*, p. 130. [3] *Post*, p. 402. [4] *Post*, p. 550.

conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of the Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada."

It was accordingly held that although fishery regulations and restrictions were within the exclusive competence of the Dominion by virtue of s. 91 sub-s. 12, yet this sub-section did not convey to the Dominion any proprietary rights with regard to fisheries and fishing. In this case also the Committee having to construe the words " rivers and lake improvements " which, by the schedule to the 108th section, were vested in the Dominion, held that the contention of the Dominion was not well founded which claimed that by these words the whole of the rivers of Canada were transferred from the provinces to the Dominion.

The Committee held also that the words " public harbours " in the schedule to s. 108 were not confined to such parts of what might ordinarily fall within the term " harbour " on which public works had been executed, but might include part of the foreshore or bed of the sea in some cases, saying " it must depend, to some extent at all events, upon the circumstances of each particular harbour which forms part of the harbour."

In *Attorney-General of British Columbia* v. *Canadian Pacific Railway Co.* (1906), A. C. 204 : [1]

" The Dominion Government had issued a Crown grant to the respondents of lands required by them under s. 18 (*a*) of their incorporating Act (44 Vict., c. 1, Canada), including all the foreshore at the street ends, and a portion of the bed of the harbour below low-water mark."

It was contended that this foreshore was vested in the Crown in the right of the province, and the Dominion legislation was *ultra vires*. The Dominion claimed it under s. 108. As to this, the Judicial Committee said (p. 209) : [2]

" The first ground was this : S. 108, with the Third Schedule of the British North America Act, 1867 (Imperial Act 30 & 31 Vict., c. 3), includes public harbours amongst the property in each province which is to be the property of Canada. This certainly empowers

[1] *Post*, p. 624. [2] *Post*, p. 629.

the Dominion Parliament to legislate for any land which forms part of a public harbour.

"In a case heard by this Board, *Attorney-General for the Dominion of Canada* v. *Attorney-General for Ontario, Quebec, and Nova Scotia*,[1] it was laid down that—

"'It does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it is equally clear that it did not form part of it.'

"In accordance with that ruling, the question whether the foreshore at that place in question formed part of the harbour, was in the present case tried as a question of fact, and evidence was given bearing upon it directed to show that before 1871, when British Columbia joined the Dominion, the foreshore at that point to which action relates was used for harbour purposes, such as the landing of goods and the like. That evidence was somewhat scanty, but it was perhaps as good as could reasonably be expected with respect to a time so far back, and a time when the harbour was in so early a stage of its commercial development. The evidence satisfied the learned trial judge, and the full court agreed with him. Their Lordships see no reason to dissent from the conclusion thus arrived at. And on this ground, if there were no other, the power of the Dominion Parliament to legislate for this foreshore would be clearly established."

The Committee also held that the Dominion had power to authorise the use of provincial Crown lands by the Company for the purposes of the railway by virtue of s. 92 sub-s. 10.

Wyatt v. *Attorney-General of Quebec* (1911), A. C. 489.[2] This was a contention between the owners of the land on both sides of the Moisie River in the province of Quebec and the Government of that province, as to fishing rights in the river between the appellants' lands, which the evidence showed to be navigable and floatable at such locality, and from thence to the mouth. The Judicial Committee upheld the claim of the province.

Burrard Power Co. v. *The King* (1911), A. C. 87.[3] British Columbia was admitted into the Dominion of Canada upon certain terms, one of which consisted of a grant of land twenty miles in width, on each side of a railway which the Dominion agreed to construct connecting the seaboard of British Columbia with the Western Railway system of Canada. Subsequently the province,

[1] *Post*, p. 553. [2] *Post*, p. 693. [3] *Post*, p. 685.

under a local statute, issued a notice reserving for industrial purposes all unrecorded water powers in a portion of this railway belt. The validity of this provincial legislation having been attacked by the Dominion, the Judicial Committee said (pp. 94, 95) : [1]

"The grant by the province of British Columbia of 'public lands' to the Dominion Government undoubtedly passed the water rights incidental to those lands. In argument addressed to their Lordships this was not really questioned. But it was said that though the proprietary rights of the province in the land and in the waters belonging thereto were transferred to the Dominion Government, the legislative powers of the province over the same neither were nor could be parted with, and that therefore it was competent for the provincial legislature to enact the Water Clauses Act of 1897, under which the record was granted. In support of this contention a passage was cited from the judgment of Lord Watson in *Attorney-General of British Columbia* v. *Attorney-General of Canada* : 'Their Lordships are of opinion that the contention is wrong, and that the passage in Lord Watson's judgment affords no kind of support for it. The object of article 11 of the terms of Union was on the one hand to secure the construction of the railway for the benefit of the province, and on the other hand to afford the Dominion a means of recouping itself in respect of the liabilities which it might incur in connection with the construction by sales to settlers of the land transferred.'

"Their Lordships are of opinion that the lands in question, so long as they remain unsettled, are 'public property' within the meaning of s. 91 of the British North America Act, 1867, and as such are under the exclusive legislative authority of the Parliament of Canada by virtue of the Act of Parliament. Before the transfer they were public lands, the proprietary rights in which were held by the Crown in right of the province. After the transfer they were still public lands, but the proprietary rights were held by the Crown in right of the Dominion, and for a public purpose, namely, the construction of the railway. This being so, no Act of the provincial legislature could affect the waters upon the lands. Nor, in their Lordships' opinion, does the Water Clauses Act of 1897 purport or intend to affect them ; for, by clause 2, the Act expressly excludes from its operation waters under the exclusive jurisdiction of the Dominion Parliament."

In *McLaren* v. *The Attorney-General of Quebec* (1914), A. C. 258, a dispute arose between the riparian owners of lands abutting on the Gatineau River in the province of Quebec, and certain grantees of water rights from the Government of the province. The Judicial Committee, reversing a majority of the

[1] *Post*, p. 691.

Supreme Court of Canada, held that this river was not navigable and floatable, and accordingly the water rights were vested in the riparian owners.

Attorney-General of British Columbia v. *The Attorney-General of Canada* (1914), A. C. p. 153.[1] The following questions were submitted to the Supreme Court of Canada, and from the opinion there expressed, a further appeal was taken to the Judicial Committee.

"1. Is it competent to the Legislature of British Columbia to authorise the Government of the province to grant by way of lease, licence, or otherwise the exclusive right to fish in any or what part or parts of the waters within the railway belt: (*a*) As to such waters as are tidal; and (*b*) as to such waters as, although not tidal, are in fact navigable?

"2. Is it competent to the Legislature of British Columbia to authorise the Government of the province to grant by way of lease, licence, or otherwise the exclusive right, or any right, to fish below low-water mark in or in any or what part or parts of the open sea within a marine league of the coast of the province?

"3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia, and the gulfs, bays, channels, arms of the sea, and estuaries of the rivers within the province or lying between the province and the United States of America, so far as concerns the authority of the Legislature of British Columbia to authorise the Government of the province to grant by way of lease, licence, or otherwise, the exclusive right or any right to fish below low-water mark in the said waters or any of them?

"The Committee discussed the nature and origin of the Constitution of the province of British Columbia in 1858, and after alluding to the case of *Attorney-General for British Columbia* v. *Attorney-General for Canada* (14 App. Cas., 295),[2] said: 'Their Lordships can see nothing in the judgment referred to which casts the slightest doubt upon the conclusion to which they have come from a direct consideration of the terms of the grant itself, namely, that the entire beneficial interest in everything that was transferred passed from the province to the Dominion. There is no reservation of anything to the grantors. The whole solum of the belt lying between its extreme boundaries passed to the Dominion, and this must include the beds of the rivers and lakes which lie within the belt. Nor can there be any doubt that every right springing from the ownership of the solum would also pass to the grantee, and this would include such rights in or over the waters of the rivers and lakes as would legally flow from the ownership of the solum.

[1] *Post*, p. 769. [2] *Post*, p. 403.

"Their Lordships entertain no doubt that the title to the solum and the water rights in the Fraser and other rivers and the lakes so far as within the belt, are at present held by the Crown in right of the Dominion and that this title extends to the exclusive management of the land and to the appropriation of its territorial revenues.

"It remains to consider the consequences as regards fishing rights. These are, in their Lordships' opinion, the same as in the ordinary case of ownership of a lake or river bed. The general principle is that fisheries are in their nature mere profits of the soil over which the water flows, and that the title to a fishery arises from the right to the solum.

"It follows from these considerations that the position of the rights of fishing in the rivers, lakes, and tidal waters (whether in rivers and estuaries or on the foreshore) within the railway belt, stands *prima facie*, as follows: In the non-tidal waters they belong to the proprietor of the soil, *i.e.* the Dominion, unless and until they have been granted by it to some individual or corporation. In the tidal waters, whether on the foreshore or in creeks, estuaries, and tidal rivers, the public have the right to fish, and by reason of the provisions of Magna Charta no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant or otherwise. It will, of course, be understood that in speaking of this public right of fishing in tidal waters, their Lordships do not refer in any way to fishing by kiddles, weirs, or other engines fixed to the soil. Such methods of fishing involve a use of the solum which, according to English law, cannot be vested in the public, but must belong either to the Crown or to some private owner.

"But we now come to the crux of the present case. The restriction above referred to relates only to royal grants, and what their Lordships here have to decide is whether the provincial legislature has the power to alter these public rights in the same way as a sovereign legislature, such as that of the United Kingdom, could alter the law in these respects within its territory."

Having referred to the limitations on the powers of the provincial legislature, the Committee said the answer to the first question must be in the negative. "So far as the waters are tidal, the right of fishing in them is a public right subject only to regulation by the Dominion Parliament. So far as the waters are not tidal, they are matters of private property, and all these proprietary rights passed with the grant of the railway belt, and became thereby vested in the Crown in right of the Dominion. The question whether non-tidal waters are navigable or not has no bearing on the question. The fishing in navigable non-tidal waters is the subject of property, and, according to English law, must have an owner and cannot be vested in the public generally."

"In regard to the second question, their Lordships have already expressed their opinion that the right of fishing in the sea is a right of the public in general which does not depend on any proprietary

title, and that the Dominion has the exclusive right of legislating with regard to it.

"The principles enunciated above suffice to answer the third question, which relates to the right of fishing in arms of the sea and the estuaries of rivers. The right to fish is, in their Lordships' opinion, a public right of the same character as that enjoyed by the public on the open seas. A right of this kind is not an incident of property, and is not confined to the subjects of the Crown who are under jurisdiction of the province. Interference with it, whether in the form of direct regulation, or by the grant of exclusive or partially exclusive rights to individuals or classes of individuals, cannot be within the power of the province, which is excluded from general legislation with regard to seacoast and inland fisheries." [1]

Representation in the House of Commons

Section 51 of the B.N.A. Act provides as follows:

"On the completion of the Census in the year One thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four provinces shall be readjusted by such authority, in such manner, and from such time, as the Parliament of Canada from time to time provides, subject and according to the following rules:

"1. Quebec shall have the fixed number of sixty-five members.

"2. There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained).

"3. In the computation of the number of members for a province a fractional part not exceeding one-half of the whole number requisite for entitling the province to a member shall be disregarded; but a fractional part exceeding one-half of that number shall be equivalent to the whole number.

"4. On any such readjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the then last preceding readjustment of the number of members for the province is ascertained at the then latest census to be diminished by one-twentieth part or upwards.

"5. Such readjustment shall not take effect until the termination of the then existing Parliament."

The application of this section to the provinces of Prince Edward Island, Nova Scotia, and New Brunswick came up for consideration

[1] Cf. *Bell* v. *Quebec*, *post*, p. 232.

by way of a reference to the Supreme Court of Canada, and from its decision an appeal was taken to the Judicial Committee in the case of *Attorney-General of Prince Edward Island* v. *Attorney-General of Canada and Attorney-General of New Brunswick* v. *Attorney-General of Canada* (1905), A. C. 37.[1] In the first appeal the following question was raised :

"Although the population of Prince Edward Island as ascertained at the census of 1901, if divided by the unit of representation ascertained by dividing the number of sixty-five into the population of Quebec is not sufficient to give six members in the House of Commons of Canada to that province, is the representation of Prince Edward Island in the House of Commons of Canada liable, under the British North America Act, 1867, and amendments thereto and the terms of Union of 1873 under which that province entered into confederation, to be reduced below six, the number granted to that province by the said terms of Union of 1873 ?

"The Supreme Court of Canada answered in the affirmative, deciding that the representation of the province is liable to be reduced according to each decennial census if the unit of representation under the British North America Act is large enough to produce that result."

In the second case in appeal the question was :

"In determining the number of representatives in the House of Commons, to which Nova Scotia and New Brunswick are respectively entitled after each decennial census, should the words 'aggregate population of Canada' in sub-s. 4 of s. 51 of the British North America Act, 1867, be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada, including that of provinces which had been admitted to the Confederation subsequent to the passage of the British North America Act ?

"The Supreme Court's answer was that the words 'aggregate population of Canada' in sub-s. 4 of s. 51 of the British North America Act, 1867, should be construed as meaning the whole population of Canada, including that of provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act."

The opinion of the Supreme Court was affirmed.

Executive Power of Lieutenant-Governor

Section 65 of the B.N.A. Act provides as follows :

"All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the

[1] *Post*, p. 605.

United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction with the respective Executive Councils, or any members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be abolished by the respective legislatures of Ontario and Quebec."

In the case of *Attorney-General of Quebec* v. *Reed* (10 App. Cas. 141),[1] the question arose as to the competence of provincial legislation that imposed a duty of 10 cents upon every exhibit filed in Court in any action depending therein. An Act of the Parliament of Canada (C.S.L.C., C. 109, S. 32) gave power to the Governor to impose any duty on exhibits in any Court of Lower Canada by order in council, and it was contended the present section made such power exercisable by the Lieutenant-Governor of the province, subject to the legislature of the province. As to this the Judicial Committee says :[2]

"With regard to the third argument, which was founded upon the 65th section of the Act, it was one not easy to follow, but their Lordships are clearly of opinion that it cannot prevail. The 65th section preserves the pre-existing powers of the Governors or Lieutenant-Governors in Council to do certain things not there specified. That, however, was subject to a power of abolition or alteration by the respective legislatures of Ontario and Quebec, with the exception, of course, of what depended on Imperial legislation. Whatever powers of that kind existed, the Act with which their Lordships have to deal neither abolishes nor alters them. It does not refer to them in any manner whatever. It is said that, among those powers there was a power, not taken away, to lay taxes of this very kind upon legal proceedings in the Courts, not for the general revenue purposes of the province, but for the purpose of forming a special fund, called 'the Building and Jury Fund,' which was appropriated for purposes connected with the adminis-

[1] *Post*, p. 360. [2] *Post*, p. 364.

tration of justice. What has been done here is quite a different thing. It is not by the authority of the Lieutenant-Governor in Council. It is not in aid of the Building and Jury Fund. It is a legislative Act without any reference whatever to those powers, if they still exist, quite collateral to them; and, if they still exist, and if it exists itself, capable of being exercised concurrently with them; to tax, for the general purposes of the province, and in aid of the general revenue, these legal proceedings.

"It appears to their Lordships that, unless it can be justified under the 92nd section of the British North America Act, it cannot be justified under the 65th."

Legislative Power—Nova Scotia and New Brunswick

S. 88. "The constitution of the Legislature of each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act; and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the period for which it was elected."

In addition to the legislative jurisdiction conferred upon the provinces by s. 92 of the B.N.A. Act, it was held in *Fielding* v. *Thomas* (1896), A. C. 600,[1] that the power to punish for an offence against its privileges was vested in the Assembly by this section, the Committee saying:[2]

"By s. 88 the constitution of the Legislature of the province of Nova Scotia was subject to the provisions of the Act to continue as it existed at the Union until altered by authority of the Act. It was therefore an existing legislature subject only to the provisions of the Act. By s. 5 of the Colonial Laws Validity Act (28 & 29 Vict., c. 63) it had at that time full power to make laws respecting its constitution, powers, and procedure. It is difficult to see how this power was taken away from it, and the power seems sufficient for the purpose."

Education

S. 93. "In and for each province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:

"1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union:

"2. All the powers, privileges, and duties at the Union by law conferred and imposed in Upper Canada on the separate

[1] *Post*, p. 506. [2] *Post*, p. 514.

schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec :

"3. Where in any province a system of separate or dissentient schools exist by law at the Union or is thereafter established by the legislature of the province, an appeal shall lie to the Governor-General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education :

"4. In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section."

The status of Roman Catholic schools in the province of Upper Canada was the subject of political agitation for many years previous to confederation. The majority of the people of that province were of the Protestant faith, and desired national schools divested of any religious instruction, whereas the Roman Catholics were strongly opposed to this, and demanded the right to have their school rates or taxes devoted to a system of separate schools, where the religious faith of the parent should be inculcated, along with secular education. Their claims in this regard were granted, and when the B.N.A. Act was passed, legislation was in force in Upper Canada which provided for Roman Catholic separate schools.

In the province of Lower Canada there was also a separate school system applicable to the Protestant minority, and Roman Catholic separate schools were also provided for in the legislation of the Maritime Provinces. The resolutions passed in the Quebec Conference which were incorporated in the B.N.A. Act provided for the retention of the separate school system in the provinces of the new Dominion, and the rights of the minority were protected by giving an appeal to the Governor-General in Council from any decision or provincial legislation which it was claimed infringed upon these rights.

Manitoba became a province of the Dominion in 1870, by a

Dominion Act which was afterwards confirmed by the Imperial Parliament. The terms of the B.N.A. became applicable to the new province. The legislature of this province in 1890 enacted a law which abolished the denominational system of public education. It did not compel the attendance of any child at the public schools, but left each denomination free to establish its own schools. It was held on the evidence by the Judicial Committee (*City of Winnipeg* v. *Barrett* (1892), A. C. 445,[1] that at the time of the passing of the Manitoba Act the only right of the Roman Catholics was to establish schools at their own expense, to maintain them by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets, and this did not confer upon Roman Catholics immunity from taxation for public school purposes.

Brophy v. *Attorney-General of Manitoba* (1895), A. C. 202.[2] Upon the passing of the Manitoba School Act of 1890 referred to in the preceding case, memorials and petitions were presented to the Governor-General in Council in behalf of the Roman Catholic minority of Manitoba by way of appeal from said Act. As a result a reference was made to the Supreme Court of Canada for an opinion as to whether the decision in the case of *City of Winnipeg* v. *Barrett* (1892), A. C. 445; (*ante*) concluded the application for redress of the Roman Catholic minority, or had the Governor-General in Council power to make the declaration or remedial orders which were asked for in the memorials. The Judicial Committee held that an appeal to the Governor in Council was well warranted, and that the Parliament of Canada could enact such remedial laws as were necessary.

[1] *Post*, p. 421. [2] *Post*, p. 457.

APPENDIX A

ORDERS IN COUNCIL

Alberta

AT THE COURT AT BUCKINGHAM PALACE

The 10th day of January, 1910

Present :

THE KING'S MOST EXCELLENT MAJESTY

Lord President — Lord Chamberlain
Lord Privy Seal — Lord Pentland
Sir Walter Hely-Hutchinson

WHEREAS by an Act passed in a session of Parliament held in the seventh and eighth years of Her late Majesty's reign (shortly entitled "The Judicial Committee Act, 1844"), it was enacted that it should be competent to Her Majesty by any Order or Orders in Council to provide for the admission of Appeals to Her Majesty in Council from any judgment, sentences, decrees, or orders of any Court of Justice within any British colony or possession abroad although such Court should not be a Court of Errors or Appeal within such Colony or Possession, and to make provision for the instituting and prosecuting of such Appeals and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon :

And whereas by an Act of the Province of Alberta in the Dominion of Canada passed in the seventh year of His Majesty's reign and being Chapter 3 entitled "An Act respecting the Supreme Court," a Superior Court of Civil and Criminal Jurisdiction was constituted and established in and for the said Province of Alberta called the Supreme Court of Alberta.

And whereas it is expedient with a view to equalising as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to His Majesty in Council and to promoting uniformity in the practice and procedure in all such Appeals that provision should be made for Appeals from the said Supreme Court to His Majesty in Council :

It is hereby ordered by the King's Most Excellent Majesty, by

and with the advice of His Privy Council, that the Rules hereunder set out shall regulate all Appeals to His Majesty in Council from the said Province of Alberta.

1. In these Rules, unless the context otherwise requires :—
   "Appeal" means Appeal to His Majesty in Council ;
   "His Majesty" includes His Majesty's Heirs and Successors ;
   "Judgment" includes decree, order, sentence, or decision ;
   "Court" means either the Full Court or a single Judge of the Supreme Court of Alberta according as the matter in question is one which, under the Rules and Practice of the Supreme Court, properly appertains to the Full Court or to a single Judge ;
   "Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence, and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal ;
   "Registrar" means the Registrar or other proper officer having the custody of the Records in the Court appealed from ;
   "Month" means calendar month ;
   Words in the singular include the plural, and words in the plural include the singular.
2. Subject to the provisions of these Rules, an Appeal shall lie :—
   (*a*) as of right, from any final Judgment of the Court where the matter in dispute on the Appeal amounts to or is of the value of one thousand pounds sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of one thousand pounds sterling or upwards ; and
   (*b*) at the discretion of the Court from any other Judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision.

3. Where in any action or other proceeding no final Judgment can be duly given in consequence of a difference of opinion between the Judges, the final Judgment may be entered *pro formâ* on the application of any party to such action or other proceeding according to the opinion of the Chief Justice, or in his absence, of the senior puisne Judge of the Court, but such Judgment shall only be deemed final for purposes of an Appeal therefrom, and not for any other purpose.

4. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days from the date of the judgment to be appealed from, and the Applicant shall give the opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by the Court in the first instance :—

(*a*) upon condition of the Appellant, within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding five hundred pounds, for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Appellant not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be) ; and

(*b*) upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the dispatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

6. Where the Judgment appealed from requires the Appellant to pay money or perform a duty, the Court shall have power, when granting leave to appeal, either to direct that the said Judgment shall be carried into execution or that the execution thereof shall be suspended pending the Appeal, as to the Court shall seem just. And in case the Court shall direct the said Judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as His Majesty in Council shall think fit to make thereon.

7. The preparation of the Record shall be subject to the supervision of the Court, and the parties may submit any disputed question arising in connection therewith to the decision of the Court, and the Court shall give such directions thereon as the justice of the case may require.

8. The Registrar, as well as the parties and their legal Agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not revelant to the subject-matter of the Appeal, and generally to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents ; but the documents omitted to be copied or printed shall be enumerated in a list to be placed after the index or at the end of the Record.

9. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the Record as finally printed (whether in Canada or in England) shall, with a view to the subsequent adjustment of

the costs of and incidental to such document, indicate in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

10. The Record shall be printed in accordance with the Rules set forth in the Schedule hereto. It may be so printed either in Canada or in England.

11. Where the Record is printed in Canada the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council forty copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof, and by affixing thereto the seal of the Court.

12. Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council, one certified copy of such Record, together with an index of all the papers and exhibits in the Case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

13. Where part of the Record is printed in Canada and part is to be printed in England, Rules 11 and 12 shall, as far as practicable, apply to such parts as are printed in Canada and such as are to be printed in England respectively.

14. The reasons given by the Judge, or any of the Judges, for or against any Judgment pronounced in the course of the proceedings out of which the Appeal arises shall by such Judge or Judges be communicated in writing to the Registrar and shall by him be transmitted to the Registrar of the Privy Council at the same time when the Record is transmitted.

15. Where there are two or more applications for leave to appeal arising out of the same matter, and the Court is of opinion that it would be for the convenience of the Lords of the Judicial Committee and all parties concerned that the Appeals should be consolidated, the Court may direct the Appeals to be consolidated and grant leave to appeal by a single order.

16. An Appellant who has obtained an order granting him conditional leave to appeal may at any time prior to the making of an order granting him final leave to appeal withdraw his Appeal on such terms as to costs and otherwise as the Court may direct.

17. Where an Appellant, having obtained an order granting him conditional leave to appeal, and having complied with the conditions imposed on him by such order, fails thereafter to apply with due diligence to the Court for an order granting him final leave to appeal, the Court may, on an application in that behalf made by the Respondent, rescind the order granting conditional leave to appeal, notwithstanding the Appellant's compliance with the conditions imposed by such order, and may give such directions as to the costs of the Appeal and the security entered into by the Appellant as the Court shall think fit, or make such further or other order in the premises as in the opinion of the Court the justice of the case requires.

18. On an application for final leave to appeal, the Court may inquire whether notice, or sufficient notice, of the application has been given by the Appellant to all parties concerned, and, if not satisfied as to the notices given, may defer the granting of the final leave to appeal, or may give such other directions in the matter as in the opinion of the Court the justice of the case requires.

19. An Appellant who has obtained final leave to appeal shall prosecute his Appeal in accordance with the Rules for the time being regulating the general practice and procedure in Appeals to His Majesty in Council.

20. Where an Appellant, having obtained final leave to appeal, desires, prior to the dispatch of the Record to England, to withdraw his Appeal, the Court may, upon an application in that behalf made by the Appellant, grant him a certificate to the effect that the Appeal has been withdrawn, and the Appeal shall thereupon be deemed, as from the date of such certificate, to stand dismissed without express Order of His Majesty in Council, and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

21. Where an Appellant, having obtained final leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of procuring the dispatch of the Record to England, the Respondent may, after giving the Appellant due notice of his intended application, apply to the Court for a certificate that the Appeal has not been effectually prosecuted by the Appellant, and if the Court sees fit to grant such a certificate, the Appeal shall be deemed, as from the date of such certificate, to stand dismissed for non-prosecution without express Order of His Majesty in Council, and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

22. Where at any time between the order granting final leave to appeal and the dispatch of the Record to England the Record becomes defective by reason of the death, or change of status, of a party to the Appeal, the Court may, notwithstanding the order granting final leave to appeal, on an application in that behalf made by any person interested, grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted or entered on the Record in place of, or in addition to, the party who has died or undergone a change of status, and the name of such person shall thereupon be deemed to be so substituted or entered on the Record as aforesaid without express Order of His Majesty in Council.

23. Where the Record subsequently to its dispatch to England becomes defective by reason of the death, or change of status, of a party to the Appeal, the Court shall, upon an application in that behalf made by any person interested, cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted, or entered,

on the Record, in place of, or in addition to, the party who has died or undergone a change of status.

24. The Case of each party to the Appeal may be printed either in Canada or in England, and shall in either event be printed in accordance with the Rules set forth in the Schedule hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the Counsel who attends at the hearing of the Appeal, or by the party himself if he conducts his Appeal in person.

25. The Case shall consist of paragraphs numbered consecutively, and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the Record as printed shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible, the reprinting in the Case of long extracts from the Record. The taxing officer, in taxing the costs of the Appeal, shall, either of his own motion or at the instance of the opposite party, inquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

26. Where the Judicial Committee directs a party to bear the costs of an Appeal incurred in [Alberta] [1] such costs shall be taxed by the proper officer of the Court in accordance with the Rules for the time being regulating taxation in the Court.

27. The Court shall conform with, and execute, any Order which His Majesty in Council may think fit to make on an Appeal from a Judgment of the Court in like manner as any original Judgment of the Court should or might have been executed.

28. Nothing in these Rules contained shall be deemed to interfere with the right of His Majesty, upon the humble Petition of any person aggrieved by any Judgment of the Court, to admit his Appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose.

ALMERIC FITZROY.

SCHEDULE

I. Records and Cases in Appeals to His Majesty in Council shall be printed in the form known as Demy Quarto (*i.e.*, 54 ems in length and 42 in width).

II. The size of the paper shall be such that the sheet, when folded and trimmed, will be 11 inches in height and $8\frac{1}{2}$ inches in width.

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes.

IV. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

[1] In the other Orders in Council this is changed to correspond with the Province in question.

British Columbia

AT THE COURT AT WINDSOR CASTLE

The 23rd day of January, 1911

Present :

THE KING'S MOST EXCELLENT MAJESTY

H.R.H. THE DUKE OF CONNAUGHT AND STRATHEARN

Lord President Lord Knollys

Sir Arthur Bigge

WHEREAS by an Act passed in a Session of Parliament held in the seventh and eighth years of Her late Majesty Queen Victoria's reign (shortly entitled " The Judicial Committee Act, 1844 "), it was enacted that it should be competent to Her Majesty by any Order or Orders in Council to provide for the admission of Appeals to Her Majesty in Council from any judgment, sentences, decrees, or orders of any Court of Justice within any British Colony or Possession abroad, although such Court should not be a Court of Error or Appeal within such Colony or Possession, and to make provision for the instituting and prosecuting of such Appeals and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon :

And whereas by an Order of Her Majesty Queen Victoria in Council dated the 12th day of July, 1887, provision was made to enable parties to appeal from the decisions of the Supreme Court of British Columbia to Her Majesty in Council :

And whereas by an Act passed by the Legislature of British Columbia in the seventh year of the reign of His late Majesty King Edward the Seventh, entitled " An Act constituting a Court of Appeal and declaring its jurisdiction," provision was made for the constitution of a Court of Appeal for the Province of British Columbia.

And whereas it is expedient, with a view to equalising as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to His Majesty in Council, and to promoting uniformity in the practice and procedure in all such Appeals, that the rules regarding Appeals from the said Supreme Court contained in the said Order in Council should be revoked and provision should be made for Appeals from the said Court of Appeal to His Majesty in Council :

It is hereby ordered by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the said Order in Council shall be and the same is hereby revoked, and that the Rules hereunder

set out shall regulate all Appeals to His Majesty in Council from the Court of Appeal of British Columbia.

1. In these Rules, unless the context otherwise requires :—
   "Appeal" means Appeal to His Majesty in Council ;
   "His Majesty" includes His Majesty's heirs and successors ;
   "Judgment" includes decree, order, sentence, or decision ;
   "Court" means the "Court of Appeal" for British Columbia ;
   "Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal ;
   "Registrar" means the Registrar or other proper officer having the custody of the Records in the Court appealed from ;
   "Month" means calendar month ;
   Words in the singular include the plural, and words in the plural include the singular.

2. Subject to the provisions of these Rules, an Appeal shall lie—
   (*a*) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards ; and
   (*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

3. Where in any action or other proceeding no final judgment can be duly given in consequence of a difference of opinion between the judges, the final judgment may be entered *pro formâ* on the application of any party to such action or other proceeding according to the opinion of the Chief Justice or, in his absence, of the senior puisne Judge of the Court, but such judgment shall only be deemed final for purposes of an Appeal therefrom, and not for any other purpose.

4. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by the Court in the first instance—
   (*a*) upon condition of the Appellant, within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding £500, for the due prosecution of the Appeal, and the payment of all

such costs as may become payable to the Respondent in the event of the Appellant's not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be); and

(*b*) upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the dispatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

(Sections 6–28 are the same as in the Alberta Order in Council, *supra*, pp. 145–150.)

Manitoba

AT THE COURT AT BUCKINGHAM PALACE

The 28th day of November, 1910

Present:

THE KING'S MOST EXCELLENT MAJESTY

Lord President	Earl Beauchamp
Lord Steward	Lord Knollys

WHEREAS by an Act passed in a Session of Parliament held in the seventh and eighth years of Her late Majesty Queen Victoria's reign (shortly entitled "The Judicial Committee Act, 1844"), it was enacted that it should be competent to Her Majesty by any Order or Orders in Council to provide for the admission of Appeals to Her Majesty in Council from any judgment, sentences, decrees, or orders of any Court of Justice within any British Colony or Possession abroad, although such Court should not be a Court of Errors or Appeal within such Colony or Possession, and to make provision for the instituting and prosecuting of such Appeals and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon:

And whereas by an Order in Council dated the 26th day of November, 1892, provision was made for the prosecution and regulation of Appeals from the Court of Queen's Bench of the Province of Manitoba in the Dominion of Canada to Her Majesty in Council:

And whereas by an Act of the said Province of Manitoba passed in the sixth year of the reign of His late Majesty King Edward VII.,

and being Chapter 18, entitled "An Act respecting a Court of Appeal for Manitoba and to amend the King's Bench Act" there was enacted and now exists a Court of Appeal for Manitoba called "The Court of Appeal" consisting of a Chief Justice styled Chief Justice of Manitoba, and three other Judges called Judges of Appeal, which Act provided that after the coming into force thereof the said Court of Appeal should be vested with and should exercise all the rights, power, and duties theretofore held, exercised, and enjoyed under and by virtue of "The King's Bench Act" or any other statute of the said Province or of the Dominion of Canada by the Court of King's Bench sitting *en banc* and as a Court of Appeal from the judgment, decision, order, or decree of a single Judge, or verdict of a jury or of a County Court Judge, or verdict of a County Court jury, and that the said Court of King's Bench should cease to have or exercise any appellate jurisdiction, and that thereafter all applications for new trials and all Appeals of the nature of those which had theretofore been heard and disposed of by or before the Court of King's Bench sitting *en banc* should be brought before and heard and disposed of by the Court of Appeal created by said Act:

And whereas no provision has yet been made for the prosecution and regulation of Appeals to His Majesty in Council from the said Court of Appeal:

And whereas it is expedient with a view to equalising as far as may be the conditions under which His Majesty's subjects beyond the Seas shall have a right of appeal to His Majesty in Council, and to promoting uniformity in the practice and procedure in all such Appeals, that the said Order in Council dated the 26th day of November, 1892, should be revoked and that provision should be made for Appeals from the Court of Appeal of Manitoba to His Majesty in Council:

It is hereby ordered by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the said Order in Council dated the 26th day of November, 1892, be and the same is hereby revoked and that the rules hereunder set out shall regulate all Appeals to His Majesty in Council from the Court of Appeal of the Province of Manitoba.

1. In these Rules, unless the context otherwise requires:—
   "Appeal" means Appeal to His Majesty in Council;
   "His Majesty" includes His Majesty's heirs and successors;
   "Judgment" includes decree, order, sentence, or decision;
   "Court" means either the Full Court or a single Judge of the Court of Appeal for Manitoba according as the matter in question is one which, under the Rules and Practice of the said Court, properly appertains to the full Court or to a single Judge;
   "Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal;

"Registrar" means the Registrar or other proper officer having the custody of the Records in the Court appealed from;

"Month" means calendar month;

Words in the singular include the plural, and words in the plural include the singular.

2. Subject to the provisions of these Rules, an Appeal shall lie—

(*a*) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £1000 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £1000 sterling or upwards; and

(*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

3. Where in any action or other proceeding no final judgment can be duly given in consequence of a difference of opinion between the judges, the final judgment may be entered *pro formâ* on the application of any party to such action or other proceeding according to the opinion of the Chief Justice, or, in his absence, of the senior puisne Judge of the Court, but such judgment shall only be deemed final for purposes of an Appeal therefrom, and not for any other purpose.

4. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by the Court in the first instance—

(*a*) upon condition of the Appellant, within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding £500, for the due prosecution of the Appeal, and for the payment of all such costs as may become payable to the Respondent in the event of the Appellant's not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be); and

(*b*) upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the dispatch thereof to England as the Court, having

regard to all the circumstances of the case, may think it reasonable to impose.

(Sections 6–28 are the same as in the Alberta Order in Council, *supra*, pp. 145–150.)

New Brunswick

AT THE COURT AT ST. JAMES'S

The 7th day of November, 1910

Present:

THE KING'S MOST EXCELLENT MAJESTY

Lord President — Mr. Secretary Harcourt
Lord Privy Seal — Sir George Buchanan.
Earl Beauchamp

WHEREAS by an Act passed in a Session of Parliament held in the seventh and eighth years of Her late Majesty Queen Victoria's reign (shortly entitled "The Judicial Committee Act, 1844"), it was enacted that it should be competent to Her Majesty by any Order or Orders in Council to provide for the admission of Appeals to Her Majesty in Council from any judgments, sentences, decrees, or orders of any Court of Justice within any British Colony or Possession abroad although such Court should not be a Court of Errors or Appeal within such Colony or Possession, and to make provision for the instituting and prosecuting of such Appeals and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon:

And whereas by an Order in Council of the 27th day of November, 1852, provision was made for regulating Appeals from the Supreme Court of the Province of New Brunswick to Her Majesty in Council:

And whereas it is expedient, with a view to equalising as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to His Majesty in Council, and to promoting uniformity in the practice and procedure in all such Appeals, that the said Order in Council of the 27th day of November, 1852, should be revoked and that new provisions should be made for regulating Appeals from the said Supreme Court to His Majesty in Council:

It is hereby ordered by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the said Order in Council of the 27th day of November, 1852, be and the same is hereby revoked and that the Rules herein set out shall regulate all Appeals to His Majesty in Council from the said Province of New Brunswick.

RULES

1. In these Rules, unless the context otherwise requires :—
   "Appeal" means Appeal to His Majesty in Council ;
   "His Majesty" includes His Majesty's heirs and successors ;
   "Judgment" includes decree, order, sentence, or decision ;
   "Court" means either the Full Court or a single Judge of the Supreme Court of New Brunswick according as the matter in question is one which, under the Rules and Practice of the Supreme Court, properly appertains to the Full Court or to a single Judge ;
   "Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal ;
   "Registrar" means the Registrar or other proper officer having the custody of the Records in the Court appealed from ;
   "Month" means calendar month ;
   Words in the singular include the plural, and words in the plural include the singular.

2. Subject to the provisions of these Rules, an Appeal shall lie—
   (*a*) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £300 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £300 sterling or upwards ; and
   (*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

3. Where in any action or other proceeding no final judgment can be duly given in consequence of a difference of opinion between the judges, the final judgment may be entered *pro formâ* on the application of any party to such action or other proceeding according to the opinion of the Chief Justice or, in his absence, of the senior puisne Judge of the Court, but such judgment shall only be deemed final for purposes of an Appeal therefrom, and not for any other purpose.

4. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days from the date of the judgment to be appealed from, and the Applicant shall give the opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by the Court in the first instance—
   (*a*) upon condition of the Appellant, within a period to be fixed by the Court but not exceeding three months from the

date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding £500, for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Appellant's not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be); and

(*b*) upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the dispatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

(Sections 6–28 are the same as in the Alberta Order in Council, *supra*, pp. 145–150.)

Nova Scotia

AT THE COURT AT BUCKINGHAM PALACE

The 5th day of July, 1911

Present:

THE KING'S MOST EXCELLENT MAJESTY

Lord President	Sir John Rhys
Lord Chamberlain	Sir Rufus Isaacs
Lord Kinnear	Mr. McKinnon Wood
Mr. Secretary Churchill	Mr. T. J. Macnamara
Mr. Secretary Harcourt	Mr. J. H. Whitley
Sir Joseph Ward	Mr. Charles Fenwick
Sir Charles Fitzpatrick	Mr. J. W. Wilson
Sir George Murray	Mr. A. Bonar Law
Sir Edward Morris	Mr. W. Hayes Fisher
Sir T. Vezey Strong	Mr. Laurence Hardy
Sir William Anson	Mr. F. E. Smith
Sir Frederick Pollock	Mr. F. Huth Jackson.

WHEREAS by an Act passed in a Session of Parliament holden in the seventh and eighth years of Her late Majesty Queen Victoria's reign, intituled, "An Act for amending an Act passed in the fourth year of

the reign of His late Majesty, intituled 'An Act for the better administration of Justice in His Majesty's Privy Council'; and to extend its jurisdiction and powers," it was amongst other things provided, that it should be competent to Her Majesty, by any Order or Orders, to be from time to time for that purpose made, with the advice of Her Privy Council, to provide for the admission of any Appeal or Appeals to Her Majesty in Council from any judgments, sentences, decrees, or orders of any Court of Justice within any British Colony or Possession abroad, although such Court should not be a Court of Error or a Court of Appeal within such Colony or Possession; and it should also be competent to Her Majesty, by any such Order or Orders as aforesaid, to make all such provisions as to Her Majesty in Council should seem meet for the instituting and prosecuting any such Appeals, and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon: Provided always, that it should be competent to Her Majesty in Council to revoke, alter, and amend any such Order or Orders as aforesaid, as to Her Majesty in Council should seem meet:

And whereas by an Order in Council dated the 20th day of March, 1863, provision was made in pursuance of the said Act to enable parties to appeal from the decisions of the Supreme Court of the Province of Nova Scotia to Her Majesty in Council:

And whereas it is expedient, with a view to equalising as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to His Majesty in Council, and to promoting uniformity in the practice and procedure in all such Appeals, that the said Order in Council of the 20th day of March, 1863, should be revoked and that new provision should be made for regulating Appeals from the said Supreme Court to His Majesty in Council:

It is hereby ordered by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the said Order in Council of the 20th day of March, 1863, be and the same is hereby revoked, and that the Rules herein set out shall regulate all Appeals to His Majesty in Council from the said Province of Nova Scotia.

1. In these Rules, unless the context otherwise requires:—

"Appeal" means Appeal to His Majesty in Council;

"His Majesty" includes His Majesty's heirs and successors;

"Judgment" includes decree, order, sentence, or decision;

"Court" means either the Full Court or a single Judge of the Supreme Court of Nova Scotia according as the matter in question is one which, under the Rules and Practice of the Supreme Court, properly appertains to the Full Court or to a single Judge.

"Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal;

"Registrar" means the Registrar or other proper officer having the custody of the Records in the Court appealed from;

"Month" means calendar month;

Words in the singular include the plural, and words in the plural include the singular.

2. Subject to the provisions of these Rules, an Appeal shall lie—

(*a*) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and

(*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

3. Where in any action or other proceeding no final judgment can be duly given in consequence of a difference of opinion between the judges, the final judgment may be entered *pro formâ* on the application of any party to such action or other proceeding according to the opinion of the Chief Justice or, in his absence, of the senior puisne Judge of the Court, but such judgment shall only be deemed final for purposes of an Appeal therefrom, and not for any other purpose.

4. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by the Court in the first instance—

(*a*) upon condition of the Appellant, within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding £500, for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Appellant's not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be); and

(*b*) upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the dispatch thereof to England as the Court, having

regard to all the circumstances of the case, may think it reasonable to impose.

(Sections 6–28 are the same as in the Alberta Order in Council, *supra*, pp. 145–150.)

Prince Edward's Island

AT THE COURT AT ST. JAMES'S

The 13th day of October, 1910

Present :

THE KING'S MOST EXCELLENT MAJESTY

Lord President	Lord Pentland
Lord Chamberlain	Sir W. S. Robson.

WHEREAS by an Act passed in a Session of Parliament held in the seventh and eighth years of Her late Majesty Queen Victoria's reign (shortly entitled " The Judicial Committee Act, 1844 "), it was enacted that it should be competent to Her Majesty by any Order or Orders in Council to provide for the admission of Appeals to Her Majesty in Council from any judgments, sentences, decrees, or orders of any Court of Justice within any British Colony or Possession abroad although such Court should not be a Court of Errors or Appeal within such Colony or Possession, and to make provision for the instituting and prosecuting of such Appeals and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon :

And whereas no Rules have yet been laid down for the regulation of Appeals from the Supreme Court of Prince Edward Island to His Majesty in Council :

And whereas it is expedient, with a view to equalising as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to His Majesty in Council, and to promoting uniformity in the practice and procedure in all such Appeals, that provision should be made for Appeals from the said Supreme Court to His Majesty in Council :

It is hereby ordered by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the Rules hereunder set out shall regulate all Appeals to His Majesty in Council from the said Province of Prince Edward Island.

RULES

1. In these Rules, unless the context otherwise requires :—
" Appeal " means Appeal to His Majesty in Council ;

"His Majesty" includes His Majesty's heirs and successors;
"Judgment" includes decree, order, sentence, or decision;
"Court" means either the Full Court or a single Judge of the *Supreme* Court of Prince Edward Island according as the matter in question is one which, under the Rules and Practice of the *Supreme* Court, properly appertains to the Full Court or to a single Judge;
"Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal;
"Registrar" means the Registrar or other proper officer having the custody of the Records in the Court appealed from;
"Month" means calendar month;
Words in the singular include the plural, and words in the plural include the singular.

2. Subject to the provisions of these Rules, an Appeal shall lie—
(*a*) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and
(*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

3. Where in any action or other proceeding no final judgment can be duly given in consequence of a difference of opinion between the judges, the final judgment may be entered *pro formâ* on the application of any party to such action or other proceeding according to the opinion of the Chief Justice or, in his absence, of the senior puisne Judge of the Court, but such judgment shall only be deemed final for purposes of an Appeal therefrom, and not for any other purpose.

4. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days from the date of the judgment to be appealed from, and the Applicant shall give the opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by the Court in the first instance—
(*a*) upon condition of the Appellant, within a period to be fixed by the Court but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding £500, for the due prosecution of the Appeal, and the payment

of all such costs as may become payable to the Respondent in the event of the Appellant's not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be); and

(*b*) upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the dispatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

(Sections 6–28 are the same as in the Alberta Order in Council, *supra*, pp. 145–150.)

SASKATCHEWAN

AT THE COURT AT ST. JAMES'S

The 13th day of October, 1910

Present:

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT	LORD PENTLAND
LORD CHAMBERLAIN	SIR W. S. ROBSON.

WHEREAS by an Act passed in a Session of Parliament held in the seventh and eighth years of Her late Majesty Queen Victoria's reign (shortly entitled "The Judicial Committee Act, 1844"), it was enacted that it should be competent to Her late Majesty by any Order or Orders in Council to provide for the admission of Appeals to Her late Majesty in Council from any judgment, sentences, decrees, or orders of any Court of Justice within any British Colony or Possession abroad although such Court should not be a Court of Error or Appeal within such Colony or Possession, and to make provision for the instituting and prosecuting of such Appeals and for carrying into effect any such decisions or sentences as Her late Majesty in Council should pronounce thereon:

AND WHEREAS by an Act of the Province of Saskatchewan in the Dominion of Canada passed in the seventh year of His late Majesty King Edward the Seventh's reign and being Chapter 8, entitled "The Judicature Act," a Superior Court of Civil and Criminal Jurisdiction was constituted and established in and for the said Province of Saskatchewan called the Supreme Court of Saskatchewan:

AND WHEREAS it is expedient with a view to equalising as far as

may be the conditions under which His Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to His Majesty in Council and to promoting uniformity in the practice and procedure in all such Appeals that provision should be made for Appeals from the said Supreme Court to His Majesty in Council :

It is hereby ordered by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the Rules hereunder set out shall regulate all Appeals to His Majesty in Council from the said Province of Saskatchewan.

Rules Respecting the Practice and Procedure in Appeals to His Majesty in Council

1. In these Rules, unless the context otherwise requires :—
   "Appeal" means Appeal to His Majesty in Council ;
   "His Majesty" includes His Majesty's heirs and successors ;
   "Judgment" includes decree, order, sentence, or decision ;
   "Court" means either the Full Court or a single Judge of the Supreme Court of Saskatchewan according as the matter in question is one which, under the Rules and practice of the Supreme Court, properly appertains to the Full Court or to a single Judge ;
   "Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal ;
   "Registrar" means the Registrar or other proper officer having the custody of the Records in the Court appealed from ;
   "Month" means calendar month ;
   Words in the singular include the plural, and words in the plural include the singular.
2. Subject to the provisions of these Rules, an Appeal shall lie—
   (*a*) as of right, from any final judgment of the Court where the matter in dispute on the Appeal amounts to or is of the value of Four thousand dollars ($4000) or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of Four thousand dollars ($4000) or upwards ; and
   (*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.
3. Where in any action or other proceeding no final judgment can be duly given in consequence of a difference of opinion between the judges, the final judgment may be entered *pro formâ* on the application

of any party to such action or other proceeding according to the opinion of the Chief Justice or, in his absence, of the senior puisne Judge of the Court, but such judgment shall only be deemed final for purposes of an Appeal therefrom, and not for any other purpose.

4. Applications to the Court for leave to appeal shall be made by motion or petition within fourteen (14) days from the date of the judgment to be appealed from and the Applicant shall give the opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by the Court in the first instance—

(*a*) upon condition of the Appellant, within a period to be fixed by the Court but not exceeding three months from the date of the hearing of the application for leave to appeal entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding Two thousand five hundred dollars ($2500) for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Appellant's not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be); and

(*b*) upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

(Sections 6–28 are the same as in the Alberta Order in Council, *supra*, pp. 145–150.)

APPENDIX B

THE BRITISH NORTH AMERICA ACT, 1867

30 Victoria, Chapter 3

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith.

[29*th March*, 1867.]

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom :

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire :

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared :

And whereas it is expedient that Provision be made for the eventual admission into the Union of other Parts of British North America :

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. Preliminary

Short Title.

1. This Act may be cited as The British North America Act, 1867.

Application of Provisions referring to the Queen.

2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

II. Union

Declaration of Union.

3. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the

Name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.

Construction of subsequent Provisions of Act.

4. The subsequent Provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the Day appointed for the Union taking effect in the Queen's Proclamation; and in the same Provisions, unless it is otherwise expressed or implied, the Name Canada shall be taken to mean Canada as constituted under this Act.

Four Provinces.

5. Canada shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

Provinces of Ontario and Quebec.

6. The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form two separate Provinces. The Part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the Part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

Provinces of Nova Scotia and New Brunswick.

7. The Provinces of Nova Scotia and New Brunswick shall have the same Limits as at the passing of this Act.

Decennial Census.

8. In the general Census of the Population of Canada which is hereby required to be taken in the Year One thousand eight hundred and seventy-one, and in every Tenth Year thereafter, the respective Populations of the Four Provinces shall be distinguished.

III. Executive Power

Declaration of Executive Power in the Queen.

9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

Application of Provisions referring to Governor-General.

10. The Provisions of this Act referring to the Governor-General extend and apply to the Governor-General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf and in the Name of the Queen, by whatever Title he is designated.

Constitution of Privy Council for Canada.

11. There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor-General.

All Powers under Acts to be exercised by Governor-General with advice of Privy Council or alone.

12. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exerciseable by the respective Governors or Lieutenant-Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant-Governors individually,

shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exerciseable by the Governor-General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor-General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.

Application of Provisions referring to Governor-General in Council.

13. The Provisions of this Act referring to the Governor-General in Council shall be construed as referring to the Governor-General acting by and with the Advice of the Queen's Privy Council for Canada.

Power to Her Majesty to authorise Governor-General to appoint Deputies.

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorise the Governor-General from Time to Time to appoint any Person or any Persons jointly or severally to be his Deputy or Deputies within any part or Parts of Canada, and in that Capacity to exercise during the Pleasure of the Governor-General such of the Powers, Authorities, and Functions of the Governor-General as the Governor-General deems it necessary or expedient to assign to him or them, subject to any Limitations or Directions expressed or given by the Queen; but the Appointment of such a Deputy or Deputies shall not affect the Exercise by the Governor-General himself of any Power, Authority, or Function.

Command of Armed Forces to continue to be vested in the Queen.

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

Seat of Government of Canada.

16. Until the Queen otherwise directs the Seat of Government of Canada shall be Ottawa.

IV. Legislative Power

Constitution of Parliament of Canada.

17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

Privileges, &c., of Houses.

18. The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.

First Session of the Parliament of Canada.

19. The Parliament of Canada shall be called together not later than Six Months after the Union.

Yearly Session of the Parliament of Canada.

20. There shall be a Session of the Parliament of Canada once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Parliament in one Session and its first Sitting in the next Session.

The Senate

21. The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators. Number of Senators.

22. In relation to the Constitution of the Senate, Canada shall be deemed to consist of Three Divisions : Representation of Provinces in Senate.

(1) Ontario ;

(2) Quebec ;

(3) The Maritime Provinces, Nova Scotia and New Brunswick ; which Three Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows : Ontario by Twenty-four Senators ; Quebec by Twenty-four Senators ; and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing Nova Scotia, and Twelve thereof representing New Brunswick.

In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A to Chapter One of the Consolidated Statutes of Canada.

23. The Qualification of a Senator shall be as follows : Qualifications of Senator.

(1) He shall be of the full age of Thirty Years :

(2) He shall be either a Natural-born Subject of the Queen, or a Subject of the Queen naturalised by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union :

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in free and common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Francalleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same :

(4) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities :

(5) He shall be resident in the Province for which he is appointed :

(6) In the case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

24. The Governor-General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Summons of Senator.

Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

Summons of First Body of Senators.

25. Such Persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union.

Addition of Senators in certain cases.

26. If at any Time on the Recommendation of the Governor-General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor-General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

Reduction of Senate to normal number.

27. In case of such Addition being at any Time made the Governor-General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of Canada is represented by Twenty-four Senators and no more.

Maximum number of Senators.

28. The Number of Senators shall not at any Time exceed Seventy-eight.

Tenure of Place in Senate.

29. A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life.

Resignation of Place in Senate.

30. A Senator may by Writing under his Hand addressed to the Governor-General resign his Place in the Senate, and thereupon the same shall be vacant.

Disqualification of Senators.

31. The Place of a Senator shall become vacant in any of the following Cases:—

(1) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate:

(2) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power:

(3) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter:

(4) If he is attainted of Treason or convicted of Felony or of any infamous Crime:

(5) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

Summons on Vacancy in Senate.

32. When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor-General shall by Summons to a fit and qualified Person fill the Vacancy.

33. If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate. Questions as to Qualifications and Vacancies in Senate.

34. The Governor-General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead. Appointment of Speaker of Senate.

35. Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers. Quorum of Senate.

36. Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative. Voting in Senate.

The House of Commons

37. The House of Commons shall, subject to the Provisions of this Act, consist of One hundred and eighty-one Members, of whom Eighty-two shall be elected for Ontario, Sixty-five for Quebec, Nineteen for Nova Scotia, and Fifteen for New Brunswick. Constitution of House of Commons in Canada.

38. The Governor-General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons. Summoning of House of Commons.

39. A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons. Senators not to sit in House of Commons.

40. Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick, shall, for the Purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows: Electoral districts of the four Provinces.

1. Ontario

Ontario shall be divided into the Counties, Ridings of Counties, Cities, Parts of Cities, and Towns enumerated in the First Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return One Member.

2. Quebec

Quebec shall be divided into Sixty-five Electoral Districts, composed of the Sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under Chapter Two of the Consolidated Statutes of Canada, Chapter Seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the Twenty-third Year of the Queen, Chapter One, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the Purposes of this Act an Electoral District entitled to return One Member.

3. Nova Scotia

Each of the Eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return Two Members, and each of the other Counties One Member.

4. New Brunswick

Each of the Fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an Electoral District. The City of St. John shall also be a separate Electoral District. Each of those Fifteen Electoral Districts shall be entitled to return One Member.

Continuance of existing Election Laws until Parliament of Canada otherwise provides.

41. Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

Writs for first Election.

42. For the First Election of Members to serve in the House of Commons the Governor-General shall cause Writs to be issued by such Person, in such Form, and addressed to such Returning Officers as he thinks fit.

The Person issuing Writs under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the issuing of Writs for the Election of Members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia, or New Brunswick; and the Returning Officers to whom Writs are directed under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the returning of Writs for the Election of Members to serve in the same respective House of Assembly or Legislative Assembly.

As to casual Vacancies.

43. In case a Vacancy in the Representation in the House of Commons of any Electoral District happens before the Meeting of the Parliament, or after the Meeting of the Parliament before Provision

is made by the Parliament in this Behalf, the Provisions of the last foregoing Section of this Act shall extend and apply to the issuing and returning of a Writ in respect of such vacant District.

As to Election of Speaker of House of Commons.

44. The House of Commons on its first assembling after a General Election shall proceed with all practicable Speed to elect One of its Members to be Speaker.

As to filling up Vacancy in Office of Speaker.

45. In case of a Vacancy happening in the Office of Speaker by Death, Resignation, or otherwise, the House of Commons shall with all practicable Speed proceed to elect another of its Members to be Speaker.

Speaker to preside.

46. The Speaker shall preside at all Meetings of the House of Commons.

Provision in case of absence of Speaker.

47. Until the Parliament of Canada otherwise provides, in case of the Absence for any Reason of the Speaker from the Chair of the House of Commons for a period of Forty-eight consecutive Hours, the House may elect another of its Members to act as Speaker, and the Member so elected shall during the Continuance of such Absence of the Speaker have and execute all the Powers, Privileges, and Duties of Speaker.

Quorum of House of Commons.

48. The Presence of at least Twenty Members of the House of Commons shall be necessary to constitute a Meeting of the House for the Exercise of its Powers; and for that Purpose the Speaker shall be reckoned as a Member.

Voting in House of Commons.

49. Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote.

Duration of House of Commons.

50. Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor-General), and no longer.

Decennial Readjustment of Representation.

51. On the Completion of the Census in the Year One thousand eight hundred and seventy-one, and of each subsequent decennial Census, the Representation of the Four Provinces shall be readjusted by such Authority, in such Manner, and from such Time, as the Parliament of Canada from Time to Time provides, subject and according to the following Rules:

(1) Quebec shall have the fixed Number of Sixty-five Members:

(2) There shall be assigned to each of the other Provinces such a Number of Members as will bear the same Proportion to the Number of its Population (ascertained at such Census) as the Number Sixty-five bears to the Number of the Population of Quebec (so ascertained):

(3) In the Computation of the Number of Members for a Province a fractional Part not exceeding One Half of the whole Number requisite for entitling the Province to a Member shall be disregarded; but a fractional Part exceeding One Half of that Number shall be equivalent to the whole Number:

(4) On any such Readjustment the Number of Members for a

Province shall not be reduced unless the Proportion which the Number of the Population of the Province bore to the Number of the aggregate Population of Canada at the then last preceding Readjustment of the Number of Members for the Province is ascertained at the then latest Census to be diminished by One Twentieth Part or upwards :

(5) Such Readjustment shall not take effect until the Termination of the then existing Parliament.

Increase of number of House of Commons.

52. The Number of Members of the House of Commons may be from Time to Time increased by the Parliament of Canada, provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed.

Money Votes ; Royal Assent

Appropriation and Tax Bills.

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Recommendation of Money Votes.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor-General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

Royal Assent to Bills, &c.

55. Where a Bill passed by the Houses of Parliament is presented to the Governor-General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

Disallowance by Order in Council of Act assented to by Governor-General.

56. Where the Governor-General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor-General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

Signification of Queen's Pleasure on Bill reserved.

57. A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until within Two Years from the Day on which it was presented to the Governor-General for the Queen's Assent, the Governor-General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be

made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of Canada.

V. Provincial Constitutions

Executive Power

Appointment of Lieutenant-Governors of Provinces.

58. For each Province there shall be an Officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by Instrument under the Great Seal of Canada.

Tenure of office of Lieutenant-Governor.

59. A Lieutenant-Governor shall hold Office during the Pleasure of the Governor-General; but any Lieutenant-Governor appointed after the Commencement of the First Session of the Parliament of Canada shall not be removable within Five Years from his Appointment, except for Cause assigned, which shall be communicated to him in Writing within One Month after the Order for his Removal is made, and shall be communicated by Message to the Senate and to the House of Commons within One Week thereafter if the Parliament is then sitting, and if not then within One Week after the Commencement of the next Session of the Parliament.

Salaries of Lieutenant-Governors.

60. The Salaries of the Lieutenant-Governors shall be fixed and provided by the Parliament of Canada.

Oaths, &c., of Lieutenant Governor.

61. Every Lieutenant-Governor shall, before assuming the Duties of his Office, make and subscribe before the Governor-General or some Person authorised by him, Oaths of Allegiance and Office similar to those taken by the Governor-General.

Application of provisions referring to Lieutenant-Governor.

62. The Provisions of this Act referring to the Lieutenant-Governor extend and apply to the Lieutenant-Governor for the Time being of each Province or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated.

Appointment of Executive Officers for Ontario and Quebec.

63. The Executive Council of Ontario and of Quebec shall be composed of such Persons as the Lieutenant-Governor from Time to Time thinks fit, and in the first instance of the following Officers, namely,—the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, with in Quebec, the Speaker of the Legislative Council and the Solicitor-General.

Executive Government of Nova Scotia and New Brunswick.

64. The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.

Powers to be exercised by Lieutenant-Governor of

65. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union

Ontario or Quebec with advice or alone.

vested in or exerciseable by the respective Governors or Lieutenant-Governors of those Provinces, with the Advice or with the Advice and Consent of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the Advice or with the Advice and Consent of or in conjunction with the respective Executive Councils, or any Members thereof, or by the Lieutenant-Governor individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be abolished or altered by the respective Legislatures of Ontario and Quebec.

Application of provisions referring to Lieutenant-Governor in Council.

66. The Provisions of this Act referring to the Lieutenant-Governor in Council shall be construed as referring to the Lieutenant-Governor of the Province acting by and with the Advice of the Executive Council thereof.

Administration in absence, &c., of Lieutenant-Governor.

67. The Governor-General in Council may from Time to Time appoint an Administrator to execute the Office and Functions of Lieutenant-Governor during his Absence, Illness, or other Inability.

Seats of Provincial Governments.

68. Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the Seats of Government of the Provinces shall be as follows, namely,—of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

Legislative Power

1. Ontario

Legislature for Ontario.

69. There shall be a Legislature for Ontario consisting of the Lieutenant-Governor and of One House, styled the Legislative Assembly of Ontario.

Electoral districts.

70. The Legislative Assembly of Ontario shall be composed of Eighty-two Members, to be elected to represent the Eighty-two Electoral Districts set forth in the First Schedule to this Act.

2. Quebec

Legislature for Quebec.

71. There shall be a Legislature for Quebec consisting of the Lieutenant-Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

Constitution of Legislative Council.

72. The Legislative Council of Quebec shall be composed of Twenty-four Members, to be appointed by the Lieutenant-Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, one being

appointed to represent each of the Twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding Office for the Term of his Life, unless the Legislature of Quebec otherwise provides under the Provisions of this Act.

Qualification of Legislative Councillors.

73. The Qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

Resignation Disqualification, &c.

74. The Place of a Legislative Councillor of Quebec shall become vacant in the Cases, *mutatis mutandis*, in which the Place of Senator becomes vacant.

Vacancies.

75. When a Vacancy happens in the Legislative Council of Quebec by Resignation, Death, or otherwise, the Lieutenant-Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified Person to fill the Vacancy.

Questions as to Vacancies, &c.

76. If any Question arises respecting the Qualification of a Legislative Councillor of Quebec, or a Vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

Speaker of Legislative Council.

77. The Lieutenant-Governor may from Time to Time, by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his stead.

Quorum of Legislative Council.

78. Until the Legislature of Quebec otherwise provides, the Presence of at least Ten Members of the Legislative Council, including the Speaker, shall be necessary to constitute a Meeting for the Exercise of its Powers.

Voting in Legislative Council.

79. Questions arising in the Legislative Council of Quebec shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the negative.

Constitution of Legislative Assembly of Quebec.

80. The Legislative Assembly of Quebec shall be composed of Sixty-five Members, to be elected to represent the Sixty-five Electoral Divisions or Districts of Lower Canada in this Act referred to, subject to Alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the Lieutenant-Governor of Quebec for Assent any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed in the Legislative Assembly with the Concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant-Governor stating that it has been so passed.

3. Ontario and Quebec

First Session of Legislatures.

81. The Legislatures of Ontario and Quebec respectively shall be called together not later than Six Months after the Union.

82. The Lieutenant-Governor of Ontario and of Quebec shall from

Summoning of Legislative Assemblies.

Time to Time, in the Queen's Name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

Restriction on election of holders of offices.

83. Until the Legislature of Ontario or of Quebec otherwise provides, a Person accepting or holding in Ontario or in Quebec any Office, Commission, or Employment, permanent or temporary, at the Nomination of the Lieutenant-Governor, to which an annual Salary, or any Fee, Allowance, Emolument, or profit of any Kind or Amount whatever from the Province is attached, shall not be eligible as a Member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this Section shall make ineligible any Person being a Member of the Executive Council of the respective Province, or holding any of the following Offices, that is to say, the Offices of Attorney-General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec Solicitor-General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such Office.

Continuance of existing Election Laws.

84. Until the Legislatures of Ontario and Quebec respectively otherwise provide, all Laws which at the Union are in force in those Provinces respectively, relative to the following Matters, or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of Canada, the Qualifications or Disqualifications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be continued, and the Trial of controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members and the issuing and Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of Ontario and Quebec.

Provided that until the Legislature of Ontario otherwise provides, at any Election for a Member of the Legislative Assembly of Ontario for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

Duration of Legislative Assemblies.

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for Four Years from the Day of the Return of the Writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant-Governor of the Province), and no longer.

Yearly Session of Legislature.

86. There shall be a Session of the Legislature of Ontario and of that of Quebec once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Legislature in each Province in one Session and its first Sitting in the next Session.

Speaker, Quorum, &c.

87. The following Provisions of this Act respecting the House of Commons of Canada shall extend and apply to the Legislative Assem-

blies of Ontario and Quebec, that is to say,—the Provisions relating to the Election of a Speaker originally and on Vacancies, the Duties of the Speaker, the absence of the Speaker, the Quorum, and the Mode of voting, as if those Provisions were here re-enacted and made applicable in Terms to each such Legislative Assembly.

4. Nova Scotia and New Brunswick

Constitutions of Legislatures of Nova Scotia and New Brunswick.

88. The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act; and the House of Assembly of New Brunswick existing at the passage of this Act shall, unless sooner dissolved, continue for the Period for which it was elected.

5. Ontario, Quebec, and Nova Scotia

First Elections.

89. Each of the Lieutenant-Governors of Ontario, Quebec, and Nova Scotia shall cause Writs to be issued for the First Election of Members of the Legislative Assembly thereof in such Form and by such Person as he thinks fit, and at such Time and addressed to such Returning Officer as the Governor-General directs, and so that the First Election of Member of Assembly for any Electoral District or any Subdivision thereof shall be held at the same Time and at the same Places as the Election for a Member to serve in the House of Commons of Canada for that Electoral District.

6. The Four Provinces

Application to Legislatures of Provisions respecting Money Votes, &c.

90. The following Provisions of this Act respecting the Parliament of Canada, namely,—the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

VI. Distribution of Legislative Powers

Powers of the Parliament

Legislative Authority of Parliament of Canada.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all

Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

(1) The Public Debt and Property.
(2) The Regulation of Trade and Commerce.
(3) The raising of Money by any Mode or System of Taxation.
(4) The borrowing of Money on the Public Credit.
(5) Postal Service.
(6) The Census and Statistics.
(7) Militia, Military and Naval Service, and Defence.
(8) The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
(9) Beacons, Buoys, Lighthouses, and Sable Island.
(10) Navigation and Shipping.
(11) Quarantine and the Establishment and Maintenance of Marine Hospitals.
(12) Sea Coast and Inland Fisheries.
(13) Ferries between a Province and any British or Foreign Country or between two Provinces.
(14) Currency and Coinage.
(15) Banking, Incorporation of Banks, and the Issue of Paper Money.
(16) Savings Banks.
(17) Weights and Measures.
(18) Bills of Exchange and Promissory Notes.
(19) Interest.
(20) Legal Tender.
(21) Bankruptcy and Insolvency.
(22) Patents of Invention and Discovery.
(23) Copyrights.
(24) Indians, and Lands reserved for the Indians.
(25) Naturalisation and Aliens.
(26) Marriage and Divorce.
(27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
(28) The Establishment, Maintenance, and Management of Penitentiaries.
(29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumera-

tion of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,— Subjects of exclusive Provincial Legislation.

(1) The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.
(2) Direct Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes.
(3) The Borrowing of Money on the sole Credit of the Province.
(4) The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
(5) The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
(6) The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
(7) The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
(8) Municipal Institutions in the Province.
(9) Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
(10) Local Works and Undertakings other than such as are of the following Classes:—
    (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
    (*b*) Lines of Steamships between the Province and any British or Foreign Country:
    (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
(11) The Incorporation of Companies with Provincial Objects.
(12) The Solemnisation of Marriage in the Province.
(13) Property and Civil Rights in the Province.
(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

(15) The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

(16) Generally all Matters of a merely local or private Nature in the Province.

Education

Legislation respecting Education.

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions :

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union :

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec :

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor-General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education :

(4) In case any such Provincial Law as from Time to Time seems to the Governor-General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor-General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor-General in Council under this Section.

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick

Legislation for uniformity of Laws in Three Provinces.

94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation

to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Agriculture and Immigration

Concurrent Powers of Legislation respecting Agriculture, &c.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

VII. Judicature

Appointment of Judges.

96. The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Selection of Judges in Ontario, &c.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor-General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of Office of Judges of Superior Courts.

99. The Judges of the Superior Courts shall hold office during good Behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons.

Salaries, &c., of Judges.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

General Court of Appeal, &c.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organisation of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

VIII. Revenues; Debts; Assets; Taxation

Creation of Consolidated Revenue fund.

102. All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the

Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.

Expenses of Collection, &c.

103. The Consolidated Revenue Fund of Canada shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the first Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor-General in Council until the Parliament otherwise provides.

Interest of Provincial Public Debts.

104. The annual Interest of the Public Debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall form the Second Charge on the Consolidated Revenue Fund of Canada.

Salary of Governor-General.

105. Unless altered by the Parliament of Canada, the salary of the Governor-General shall be Ten thousand Pounds Sterling Money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the Third Charge thereon.

Appropriation from time to time.

106. Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

Transfer of Stocks, &c.

107. All Stocks, Cash, Bankers' Balances, and Securities for Money belonging to each Province at the time of the Union, except as in this Act mentioned, shall be the Property of Canada, and shall be taken in Reduction of the amount of the respective Debts of the Provinces at the Union.

Transfer of Property in Schedule.

108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

Property in Lands, Mines, &c.

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Assets connected with Provincial Debts.

110. All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

Canada to be liable for Provincial Debts.

111. Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

Debts of Ontario and Quebec.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the Debt of the Province of Canada exceeds at the Union Sixty-two million five hundred thousand dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

Assets of Ontario and Quebec.

113. The Assets enumerated in the Fourth Schedule to this Act belonging at the Union to the Province of Canada shall be the Property of Ontario and Quebec conjointly.

Debt of Nova Scotia.

114. Nova Scotia shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Eight million Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

Debt of New Brunswick.

115. New Brunswick shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Seven million Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

Payment of Interest to Nova Scotia and New Brunswick.

116. In case the Public Debts of Nova Scotia and New Brunswick do not at the Union amount to Eight million and Seven million Dollars respectively, they shall respectively receive by half-yearly Payments in advance from the Government of Canada Interest at Five per Centum per Annum on the Difference between the actual Amounts of their respective Debts and such stipulated Amounts.

Provincial Public Property.

117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.

Grants to Provinces.

118. The following Sums shall be paid yearly by Canada to the several Provinces for the Support of their Governments and Legislatures:

	Dollars.
Ontario	Eighty thousand
Quebec	Seventy thousand
Nova Scotia	Sixty thousand
New Brunswick	Fifty thousand
	Two hundred and sixty thousand;

and an annual Grant in aid of each Province shall be made, equal to Eighty Cents per Head of the Population as ascertained by the Census of One thousand eight hundred and sixty-one, and in the Case of Nova Scotia and New Brunswick, by each subsequent Decennial Census until the Population of each of those two Provinces amounts to Four hundred thousand Souls, at which Rate such Grant shall thereafter remain. Such Grants shall be in full Settlement of all future Demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such Grants, as against any Province, all Sums chargeable as Interest on the Public Debt of that Province in excess of the several Amounts stipulated in this Act.

Further Grant to New Brunswick.

119. New Brunswick shall receive by half-yearly Payments in advance from Canada for the Period of Ten years from the Union an additional Allowance of Sixty-three thousand Dollars per Annum; but as long as the Public Debt of that Province remains under Seven million Dollars, a Deduction equal to the Interest at Five per Centum per Annum on such Deficiency shall be made from that Allowance of Sixty-three thousand Dollars.

Form of Payments.

120. All Payments to be made under this Act, or in discharge of Liabilities created under any Act of the Provinces of Canada, Nova

Scotia, and New Brunswick respectively, and assumed by Canada, shall, until the Parliament of Canada otherwise directs, be made in such Form and Manner as may from Time to Time be ordered by the Governor-General in Council.

Canadian Manufactures, &c.

121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Continuance of Customs and Excise Laws.

122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.

Exportation and Importation as between two Provinces.

123. Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation.

Lumber Dues in New Brunswick.

124. Nothing in this Act shall affect the Right of New Brunswick to levy the Lumber Dues provided in Chapter Fifteen of Title Three of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the Amount of such Dues; but the Lumber of any of the Provinces other than New Brunswick shall not be subject to such Dues.

Exemption of Public Lands, &c.

125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

Provincial Consolidated Revenue Fund.

126. Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

IX. Miscellaneous Provisions

General

As to Legislative Councillors of Provinces becoming Senators.

127. If any Person being at the passing of this Act a Member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a Place in the Senate is offered, does not within Thirty Days thereafter, by Writing under his Hand addressed to the Governor-General of the Province of Canada or to the Lieutenant-Governor of Nova Scotia or New Brunswick (as the Case may be), accept the same, he shall be deemed to have declined the same; and any Person who, being at the passing of this Act a Member of the Legislative Council of Nova Scotia or New Brunswick, accepts a place in the Senate shall thereby vacate his Seat in such Legislative Council.

Oath of Allegiance, &c.

128. Every Member of the Senate or House of Commons of Canada shall before taking his Seat therein take and subscribe before the Governor-General or some Person authorised by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall before taking his Seat therein take and subscribe before the Lieutenant-Governor of the Province or some Person authorised by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of Canada and every Member of the Legislative Council of Quebec shall also, before taking his Seat therein, take and subscribe before the Governor-General, or some Person authorised by him, the Declaration of Qualification contained in the same Schedule.

Continuance of existing Laws, Courts, Officers, &c.

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

Transfer of Officers to Canada.

130. Until the Parliament of Canada otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be Officers of Canada, and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities, and Penalties as if the Union had not been made.

Appointment of new Officers.

131. Until the Parliament of Canada otherwise provides, the Governor-General in Council may from Time to Time appoint such Officers as the Governor-General in Council deems necessary or proper for the effectual Execution of this Act.

Treaty Obligations.

132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries.

Use of English and French Languages.

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

Ontario and Quebec

Appointment of Executive Officers for Ontario and Quebec.

134. Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant-Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following Officers, to hold Office during Pleasure, that is to say,—the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the Case of Quebec the Solicitor-General, and may, by Order of the Lieutenant-Governor in Council, from Time to Time prescribe the Duties of those Officers and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof; and may also appoint other and additional Officers to hold Office during Pleasure, and may from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof.

Powers, Duties, &c., of Executive Officers.

135. Until the Legislature of Ontario or Quebec otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver-General, by any Law, Statute or Ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any Officer to be appointed by the Lieutenant-Governor for the Discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and Functions of the Office of Minister of Agriculture at the passing of this Act imposed by the Law of the Province of Canada, as well as those of the Commissioner of Public Works.

Great Seals.

136. Until altered by the Lieutenant-Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the same Design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

Construction of temporary Acts.

137. The Words "and from thence to the End of the then next ensuing Session of the Legislature," or Words to the same Effect, used in any temporary Act of the Province of Canada not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of Canada if the subject Matter of the Act is within the Powers of the same, as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively if the Subject Matter of the Act is within the Powers of the same as defined by this Act.

As to Errors in Names.

138. From and after the Union the Use of the Words "Upper Canada" instead of "Ontario," or "Lower Canada" instead of "Quebec," in any Deed, Writ, Process, Pleading, Document, Matter, or Thing, shall not invalidate the same.

As to issue of Proclamations before Union, to commence after Union.

139. Any Proclamation under the Great Seal of the Province of Canada issued before the Union to take effect at a Time which is subsequent to the Union, whether relating to that Province, or to Upper Canada, or to Lower Canada, and the several Matters and Things therein proclaimed shall be and continue of like Force and Effect as if the Union had not been made.

As to issue of Proclamations after Union.

140. Any Proclamation which is authorised by any Act of the Legislature of the Province of Canada to be issued under the Great Seal of the Province of Canada, whether relating to that Province, or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant-Governor of Ontario or of Quebec, as its Subject Matter requires, under the Great Seal thereof; and from and after the Issue of such Proclamation the same and the several Matters and Things therein proclaimed shall be and continue of the like Force and Effect in Ontario or Quebec as if the Union had not been made.

Penitentiary.

141. The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec.

Arbitration respecting Debts, &c.

142. The Division and Adjustment of the Debts, Credits, Liabilities, Properties, and Assets of Upper Canada and Lower Canada shall be referred to the Arbitrament of Three Arbitrators, One chosen by the Government of Ontario, One by the Government of Quebec, and One by the Government of Canada; and the Selection of the Arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the Arbitrator chosen by the Government of Canada shall not be a Resident either in Ontario or in Quebec.

Division of Records.

143. The Governor-General in Council may from Time to Time order that such and so many of the Records, Books, and Documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the Property of that Province; and any Copy thereof or Extract therefrom, duly certified by the Officer having charge of the Original thereof, shall be admitted as Evidence.

Constitution of Townships in Quebec.

144. The Lieutenant-Governor of Quebec may from Time to Time, by Proclamation under the Great Seal of the Province, to take effect from a day to be appointed therein, constitute Townships in those Parts of the Province of Quebec in which Townships are not then already constituted, and fix the Metes and Bounds thereof.

X. Intercolonial Railway

Duty of Government and Parliament of Canada to make Railway herein described.

145. Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that Provision should be made for its immediate Construction by the Government of Canada: Therefore, in order to give effect to that Agreement, it shall be the Duty of the Government and Parliament of Canada to provide for the Commencement within Six Months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the Construction thereof without Intermission, and the Completion thereof with all practicable Speed.

XI. Admission of other Colonies

Power to admit Newfoundland, &c., into the Union.

146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

As to Representation of Newfoundland and Prince Edward Island in Senate.

147. In case of the Admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a Representation in the Senate of Canada of Four Members, and (notwithstanding anything in this Act) in case of the Admission of Newfoundland the normal Number of Senators shall be Seventy-six and their maximum Number shall be Eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the Three Divisions into which Canada is, in relation to the Constitution of the Senate, divided by this Act, and accordingly, after the Admission of Prince Edward Island, whether Newfoundland is admitted or not, the Representation of Nova Scotia and New Brunswick in the Senate shall, as Vacancies occur, be reduced from Twelve to Ten Members respectively, and the Representation of each of those Provinces shall not be increased at any Time beyond Ten, except under the Provision of this Act for the Appointment of Three or Six additional Senators under the Direction of the Queen.

SCHEDULES

The FIRST SCHEDULE

Electoral Districts of Ontario

A

Existing Electoral Divisions

Counties

1. Prescott.
2. Glengarry.
3. Stormont.
4. Dundas.
5. Russell.
6. Carleton.
7. Prince Edward.
8. Halton.
9. Essex

Ridings of Counties

10. North Riding of Lanark.
11. South Riding of Lanark.
12. North Riding of Leeds and North Riding of Grenville.
13. South Riding of Leeds.
14. South Riding of Grenville.
15. East Riding of Northumberland.
16. West Riding of Northumberland (excepting therefrom the Township of South Monaghan).
17. East Riding of Durham.
18. West Riding of Durham.
19. North Riding of Ontario.
20. South Riding of Ontario.
21. East Riding of York.
22. West Riding of York.
23. North Riding of York.
24. North Riding of Wentworth.
25. South Riding of Wentworth.
26. East Riding of Elgin.
27. West Riding of Elgin.
28. North Riding of Waterloo.
29. South Riding of Waterloo.
30. North Riding of Brant.
31. South Riding of Brant.
32. North Riding of Oxford.
33. South Riding of Oxford.
34. East Riding of Middlesex.

Cities, Parts of Cities, and Towns

35. West Toronto.
36. East Toronto.
37. Hamilton.
38. Ottawa.
39. Kingston.
40. London.
41. Town of Brockville, with the Township of Elizabethtown thereto attached.
42. Town of Niagara, with the Township of Niagara thereto attached.
43. Town of Cornwall, with the Township of Cornwall thereto attached.

B

New Electoral Divisions

44. The Provisional Judicial District of Algoma.

The County of Bruce, divided into Two Ridings, to be called respectively the North and South Ridings :—

45. The North Riding of Bruce to consist of the Townships of Bury, Lindsay, Eastnor, Albermarle, Amabel, Arran, Bruce, Elderslie, and Saugeen, and the Village of Southampton.
46. The South Riding of Bruce to consist of the Townships of Kincardine (including the Village of Kincardine), Greenock, Brant, Huron, Kinloss, Culross, and Carrick.

The County of Huron, divided into Two Ridings, to be called respectively the North and South Ridings :—

47. The North Riding to consist of the Townships of Ashfield, Wawanosh, Turnberry, Howick, Morris, Grey, Colborne, Hullett, including the Village of Clinton, and McKillop.
48. The South Riding to consist of the Town of Goderich and the Townships of Goderich, Tuckersmith, Stanley, Hay, Usborne, and Stephen.

The County of Middlesex, divided into three Ridings, to be called respectively the North, West, and East Ridings :—

49. The North Riding to consist of the Townships of McGillivray and Biddulph (taken from the County of Huron), and Williams East, Williams West, Adelaide, and Lobo.
50. The West Riding to consist of the Townships of Delaware, Carradoc, Metcalfe, Mosa and Ekfrid, and the Village of Strathroy.

[The East Riding to consist of the Townships now embraced therein, and be bounded as it is at present.]

51. The County of LAMBTON to consist of the Townships of Bosanquet, Warwick, Plympton, Sarnia, Moore, Enniskillen, and Brooke, and the Town of Sarnia.
52. The County of KENT to consist of the Townships of Chatham, Dover, East Tilbury, Romney, Raleigh, and Harwich, and the Town of Chatham.
53. The County of BOTHWELL to consist of the Townships of Sombra, Dawn, and Euphemia (taken from the County of Lambton), and the Townships of Zone, Camden with the Gore thereof, Orford, and Howard (taken from the County of Kent).

The County of GREY, divided into Two Ridings, to be called respectively the South and North Ridings :—

54. The South Riding to consist of the Townships of Bentinck, Glenelg, Artemesia, Osprey, Normanby, Egremont, Proton, and Melancthon.
55. The North Riding to consist of the Townships of Collingwood, Euphrasia, Holland, Saint-Vincent, Sydenham, Sullivan, Derby, and Keppel, Sarawak and Brooke, and the Town of Owen Sound.

The County of PERTH, divided into Two Ridings, to be called respectively the South and North Ridings :—

56. The North Riding to consist of the Townships of Wallace, Elma, Logan, Ellice, Mornington, and North Easthope, and the Town of Stratford.
57. The South Riding to consist of the Townships of Blanchard, Downie, South Easthope, Fullarton, Hibbert, and the Villages of Mitchell and St. Mary's.

The County of WELLINGTON, divided into Three Ridings, to be called respectively North, South and Centre Ridings :—

58. The North Riding to consist of the Townships of Amaranth, Arthur, Luther, Minto, Maryborough, Peel, and the Village of Mount Forest.
59. The Centre Riding to consist of the Townships of Garafraxa, Erin, Eramosa, Nichol, and Pilkington, and the Villages of Fergus and Elora.
60. The South Riding to consist of the Town of Guelph, and the Townships of Guelph and Puslinch.

The County of NORFOLK, divided into Two Ridings, to be called respectively the South and North Ridings :—

61. The South Riding to consist of the Townships of Charlotteville, Houghton, Walsingham, and Woodhouse, and with the Gore thereof.
62. The North Riding to consist of the Townships of Middleton, Townsend, and Windham, and the Town of Simcoe.
63. The County of HALDIMAND to consist of the Townships of

Oneida, Seneca, Cayuga North, Cayuga South, Rainham, Walpole, and Dunn.

64. The County of Monck to consist of the Townships of Canborough and Moulton, and Sherbrooke, and the Village of Dunnville (taken from the County of Haldimand), the Townships of Caister and Gainsborough (taken from the County of Lincoln), and the Townships of Pelham and Wainfleet (taken from the County of Welland).
65. The County of Lincoln to consist of the Townships of Clinton, Grantham, Grimsby, and Louth, and the Town of St. Catherines.
66. The County of Welland to consist of the Townships of Bertie, Crowland, Humberstone, Stamford, Thorold, and Willoughby, and the Villages of Chippewa, Clifton, Fort Erie, Thorold, and Welland.
67. The County of Peel to consist of the Townships of Chinguacousy, Toronto, and the Gore of Toronto, and the Villages of Brampton and Streetsville.
68. The County of Cardwell to consist of the Townships of Albion and Caledon (taken from the County of Peel), and the Townships of Adjala and Mono (taken from the County of Simcoe).

The County of Simcoe, divided into Two Ridings, to be called respectively the South and North Ridings :—

69. The South Riding to consist of the Townships of West Gwillimbury, Tecumseth, Innisfil, Essa, Tossorontio, Mulmur, and the Village of Bradford.
70. The North Riding to consist of the Townships of Nottawasaga, Sunnidale, Vespra, Flos, Oro, Medonte, Orillia and Matchedash, Tiny and Tay, Balaklava and Robinson, and the Towns of Barrie and Collingwood.

The County of Victoria, divided into Two Ridings, to be called respectively the South and North Ridings :—

71. The South Riding to consist of the Townships of Ops, Mariposa, Emily, Verulam, and the Town of Lindsay.
72. The North Riding to consist of the Townships of Anson, Bexley, Carden, Dalton, Digby, Eldon, Fenelon, Hindon, Laxton, Lutterworth, Macaulay and Draper, Sommerville, and Morrison, Muskoka, Monck and Watt (taken from the County of Simcoe), and any other surveyed Townships lying to the North of the said North Riding.

The County of Peterborough, divided into Two Ridings, to be called respectively the West and East Ridings :—

73. The West Riding to consist of the Townships of South Monaghan (taken from the County of Northumberland), North Monaghan, Smith, and Ennismore, and the Town of Peterborough.

74. The East Riding to consist of the Townships of Asphodel, Belmont and Methuen, Douro, Dummer, Galway, Harvey, Minden, Stanhope, and Dysart, Otonabee, and Snowden. and the Village of Ashburnham, and any other surveyed Townships lying to the North of the said East Riding.

The County of HASTINGS, divided into Three Ridings, to be called respectively the West, East, and North Ridings :—

75. The West Riding to consist of the Town of Belleville, the Township of Sydney, and the Village of Trenton.

76. The East Riding to consist of the Townships of Thurlow, Tyendinaga, and Hungerford.

77. The North Riding to consist of the Townships of Rawdon, Huntingdon, Madoc, Elzevir, Tudor, Marmora, and Lake and the Village of Stirling and any other surveyed Townships lying to the North of the said North Riding.

78. The County of LENNOX, to consist of the Townships of Richmond, Adolphustown, North Fredericksburgh, South Fredericksburgh, Ernest Town and Amherst Island, and the Village of Napanee.

79. The County of ADDINGTON to consist of the Townships of Camden, Portland, Sheffield, Hinchinbrooke, Kaladar, Kennebec, Olden, Oso, Anglesea, Barrie, Clarendon, Palmerston, Effingham, Abinger, Miller, Canonto, Denbigh, Loughborough, and Bedford.

80. The County of FRONTENAC to consist of the Townships of Kingston, Wolfe Island, Pittsburg, and Howe Island, and Storrington.

The County of RENFREW, divided into Two Ridings, to be called respectively the South and North Ridings :—

81. The South Riding to consist of the Townships of McNab, Bagot, Blithfield, Brougham, Horton, Admaston, Grattan, Matawatchan, Griffith, Lyndoch, Raglan, Radcliffe, Brudenell, Sebastopol, and the Villages of Arnprior and Renfrew.

82. The North Riding to consist of the Townships of Ross, Bromley, Westmeath, Stafford, Pembroke, Wilberforce, Alice, Petewawa, Buchanan, South Algona, North Algona, Fraser, McKay, Wylie, Rolph, Head, Maria, Clara, Haggerty, Sherwood, Burns, and Richards, and any other surveyed Townships lying North-westerly of the said North Riding.

Every Town and incorporated Village existing at the Union, not especially mentioned in this Schedule, is to be taken as Part of the County or Riding within which it is locally situate.

The SECOND SCHEDULE

Electoral Districts of Quebec specially fixed

COUNTIES OF—

Pontiac	Missisquoi	Compton
Ottawa	Brome	Wolfe and Richmond
Argenteuil	Shefford	Megantic
Huntingdon	Stanstead	

Town of Sherbrooke.

The THIRD SCHEDULE

Provincial Public Works and Property to be the Property of Canada

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and Public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the Use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.

The FOURTH SCHEDULE

Assets to be the Property of Ontario and Quebec conjointly

Upper Canada Building Fund.
Lunatic Asylums.
Normal School.
Court Houses in Aylmer, Montreal, Kamouraska, — Lower Canada.
Law Society, Upper Canada.
Montreal Turnpike Trust.

University Permanent Fund.
Royal Institution.
Consolidated Municipal Loan Fund, Upper Canada.
Consolidated Municipal Loan Fund, Lower Canada.
Agricultural Society, Upper Canada.
Lower Canada Legislative Grant.
Quebec Fire Loan.
Temiscouata Advance Account.
Quebec Turnpike Trust.
Education—East.
Building and Jury Fund, Lower Canada.
Municipalities Fund.
Lower Canada Superior Education Income Fund.

The FIFTH SCHEDULE

Oath of Allegiance

I, *A. B.*, do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

Note.—The Name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with Proper Terms of Reference thereto.

Declaration of Qualification

I, *A. B.* do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [*or as the Case may be*], and that I am legally or equitably seised as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common Socage [*or* seised or possessed for my own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture (*as the Case may be*),] in the Province of Nova Scotia [*or as the Case may be*] of the Value of Four thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges, and Incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a Title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [*or as the Case may be*], and that my Real and Personal Property are together worth Four thousand Dollars over and above my Debts and Liabilities.

APPENDIX C

CUVILLIER *v.* AYLWIN, 2 Knapp 72

J. C.
1832
Nov. 29.

[PRIVY COUNCIL.]

AUSTIN CUVILLIER . . . . . APPELLANT;

AND

OBADIAH AYLWIN . . . . . RESPONDENT.

BY PETITION, FROM LOWER CANADA.

[Nov. 29, 1832].

An Act of the Parliament of Great Britain declared, that all laws passed by the Legislature of a colony should be valid and binding within the colony, and directed that the Colonial Court of Appeal should be subjected to such appeal as it was previously to the passing of the Act, and also to such further and other provisions as might be made in that behalf by any Act of the Colonial Legislature: Held, that an Act having been passed by the Colonial Legislature, limiting the right of appeal to causes where the sum in dispute was not less than £500 sterling, a petition for leave to appeal, in a cause where the sum was of less amount, could not be received by the King, in Council, although there was a special saving in the Colonial Act of the rights and prerogatives of the Crown.

THE Act of Parliament, 31 Geo. 3, c. 31, commonly called the Canada Act, enacts (s. 2), that there shall be a Legislative Council and Assembly in each of the provinces of Upper and Lower Canada, and that "in each of the said provinces respectively His Majesty, his Heirs or Successors, shall have power, during the continuance of this Act, by and with the advice and consent of the Legislative Council and Assembly of such provinces respectively, to make laws for the peace, welfare and good government thereof, such laws not being repugnant to this Act; and that all such laws, being passed by the Legislative Council and Assembly of either of the said provinces respectively, and assented to by His Majesty, his Heirs or Successors, or assented to in His Majesty's name, by such person as His Majesty, his Heirs or Successors, shall from time to time appoint to be the Governor or Lieutenant-governor of such province, or by such person as His Majesty, his Heirs and Successors, shall from time to time

appoint to administer the government within the same, shall be, and the same are hereby declared to be, by virtue of and under the authority of this Act, valid and binding to all intents and purposes whatever within the province in which the same shall have been so passed." There is also a provision in this Act for the transmission, by the Governor, Lieutenant-governor, or other person administering the government, by the first convenient opportunity, of all Bills which have been passed by the Legislative Council and Assembly, and assented to by him in His Majesty's name, to one of the principal Secretaries of State; and also power reserved to the King of disallowing any such Bill within two years (1) after it has been received by the Secretary of State (s. 31). The 34th section also directs, "that the Governor or Lieutenant-governor, or person administering the government of each of the said provinces respectively, together with such Executive Council as shall be appointed by His Majesty for the affairs of such province, shall be a Court of civil jurisdiction within each of the said provinces respectively, for hearing and determining appeals within the same, in the like cases and in the like manner and form, and subject to such appeal therefrom, as such appeals might before the passing of this Act have been heard and determined by the Governor and Council of the province of Quebec; but subject, nevertheless, to such further or other provisions as may be made in this behalf by any Act of the Legislative Council and Assembly of either of the said provinces respectively, assented to by His Majesty, his Heirs or Successors."

2 *Knapp*, p. 74.

The Legislative Council and Assembly of Lower Canada passed an Act in the 34th year of King George the 3rd [34 Geo. iii. c. 6], commonly called the Judicature Act, which was assented to by the Governor for the time being, transmitted by him to the Secretary of State, for His Majesty's approval, and was not disallowed by him. The 30th section of this Judicature Act enacts, "that the judgment of the Court of Appeals shall be final in all cases, where the matter in dispute shall not exceed the sum or value of £500 sterling; but in cases exceeding that sum or value, as well as in all cases where the matter in question shall relate to any fee of

(1) The greater part of the Colonial Statutes receive no express confirmation by the King, and are held to be valid without it. Those only are confirmed which relate to measures of general and peculiar importance or interest, or contain a clause suspending their operation until the pleasure of the King is known, the latter of which, if not confirmed within three years from their passing, are considered as disallowed, by the provisions of an Order of Council of the 6th of January 1806. Both the confirmation and disallowance of Colonial Statutes are subjects of a special order by the King in Council. See Report on Barbadoes by the Commissioners for inquiring into the Administration of Civil and Criminal Justice in the West Indies, p. 9.

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office, duty, rent, revenue, or any sum or sums of money payable to His Majesty, titles to lands or tenements, annual rents, or such like matters or things, where the rights in future may be bound, an appeal shall be to His Majesty in his Privy Council, though the immediate sum or value appealed for be less than £500 sterling, provided security be first duly given by the appellant, that he will effectually prosecute his appeal, and answer the condemnation, and also pay such costs and damages as shall be awarded by His Majesty in his Privy Council, in case the judgment of the said Court of Appeals of this province be affirmed; or provided that the appellant agrees and declares in writing, at the Clerk's-office of the Court appealed from, that he does not object to the judgment against him being carried into effect according to law, on which condition he shall give sureties for the costs of appeal only in case the appeal is dismissed; and on condition, also, that the appellees shall not be obliged to render and return to the appellant more than the net proceeds of the execution, with legal interest on the sum recovered, or the restitution of the real property, and of the net value of the produce and revenues of the real property, whereof the appellee has been put in possession by virtue of the execution, to take place from the day he recovered the sum, or possessed the real property, until perfect restitution is made, but without any damage against the appellee by reason of such execution, in case that the judgment be reversed, any law, custom, or usage to the contrary notwithstanding." In the 43rd section of this Act there is a proviso, "that nothing therein contained shall he construed in any manner to derogate from the rights of the Crown, to erect, constitute and appoint Courts of civil or criminal jurisdiction within this province, and to appoint from time to time the judges and officers thereof, as His Majesty, his Heirs or Successors shall think necessary or proper for the circumstances of this province, or to derogate from any other right or prerogative of the Crown whatsoever."

2 Knapp, p. 75.

The respondent in this case had obtained a judgment of the Court of Appeals for Lower Canada, dated the 20th of November 1816, (reversing a previous one of the Court of King's Bench for Montreal), for the sum of £397 14s. 7d. currency, and costs, and sued out execution upon it. The appellant then filed a writ of "opposition" to the execution (somewhat resembling our *auditâ querelâ* (see Pothier, Traité de la Procédure Civile, partie 4, cap. 2nde, art. 6)), and put in pleadings, called "Moyens d'Opposition," in support of it. To these pleadings the respondent put in an answer, issue was joined thereon, and the Court of King's Bench

2 Knapp, p. 76.

at Montreal ultimately granted a *main levée* on the execution, which it declared to have been illegally obtained. The respondent then appealed to the Court of Appeals, and that tribunal, by a judgment dated the 30th of July 1821, reversed the judgment of the Court of King's Bench.

In July 1823 the appellant presented a petition to the King in Council, for leave to appeal from both the judgments of the Court of Appeals, of the 20th of November 1816 and the 30th of July 1821; and on the 23d of June 1824 he obtained an Order of Council, that he should be permitted to do so, without prejudice to the question, whether the appeal was competent or not, upon giving security in the sum of £100 to prosecute the appeal within a year and a day from the date of the order, and to stand the determination, in case the appeal should be dismissed. In December 1826, the respondent presented his petition to the King in Council, that the appellant's petition should be dismissed with costs. This petition was heard before the Committee for hearing Plantation Appeals, on the 30th of January and 2d of February 1827, when their Lordships ordered that cases should be printed on both sides, confined to the question of the competency of appeal. Cases were accordingly prepared, and the petition came on now for hearing.

Coltman (K.C.), for the Petitioner.—The right of the King in Council to hear and determine appeals from the Colonial Courts, on every subject, and of every amount in value, is one of the most ancient and undoubted prerogatives of the Crown (Black. Comm. vol. 1st, book 1st, cap. 5, p. 231). No prerogative right of His Majesty, much less one which is calculated, as this is, for the relief and protection of the subject in distant countries, can be abridged or abrogated, except by the most direct and express words of an Act of the general Legislature. The King himself cannot derogate from his own right, or refuse to exercise his own prerogative for the benefit of the subject. Lord Mansfield, in the case of *Hall* v. *Campbell*, states it as a clear proposition, "that if the King has a power to alter the old, and introduce new laws, in a conquered country, this legislation being subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles" (Cowper, 209). One of these fundamental principles has always been understood to be, the right of all who are injured by the determination of the Courts in His Majesty's colonies, to appeal to him in his Council for redress. It is true, that in the instructions to the governors of plantations there is a limit put upon their power to allow appeals in causes where the amount in dispute is under a certain value; but in all those instructions there is an express

2 *Knapp*, p. 77.

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2 *Knapp*, *p.* 78.

reservation of the power of the King himself, in Council, to admit appeals upon any terms, and for any value. As far as regards the province of Lower Canada, there are no words in the English statute of the 31st Geo. the 3d [c. 31], which take away from the subject the right of appeal, to which he is entitled by the common law of England. The words of the provincial statute of the 34th Geo. the 3d [34 Geo. iii. c. 6] are certainly more extensive; but in that also there are express provisoes, that nothing therein contained should derogate from the rights of the Crown, either to constitute other Courts of Justice, or from any other right or prerogative of the Crown whatsoever. It would, indeed, be beyond the power of a provincial Legislature to take away the rights of His Majesty to receive appeals, even if such were their intention; and if such a construction were to be put upon this provincial Act, it would be inconsistent with the 31st Geo. the 3d [c. 31], which has been always regarded as the constitutional charter of the Canadas.

Lushington (Dr.), and M'Dougall, appeared for the Respondents.

Master of the Rolls.—It is not necessary to hear counsel on the other side. The King has no power to deprive the subject of any of his rights; but the King, acting with the other branches of the Legislature, as one of the branches of the Legislature, has the power of depriving any of his subjects, in any of the countries under his dominion, of any of his rights. This petition must therefore be dismissed. (1)

J. C. 1862 *Feb.* 8.

IN RE MAROIS, 15 MOO. P.C. 189.

[PRIVY COUNCIL.]

ON PETITION FROM THE COURT OF QUEEN'S BENCH, LOWER CANADA.

IN RE LOUIS MAROIS* [Feb. 8, 1862].

The amount recovered in an action in Lower Canada, was under the sum of £500, sterling, the amount specified by the 34 Geo. III., c. 6, sec. 30, of Lower Canada, as the lowest limit of appeal to England. Several other actions had been brought against the same party, founded on the same transaction, in which on the face of the judgment obtained against him, he would have no defence. Upon a special petition for leave to appeal, notwithstanding that the amount was under the appealable value. Held, First, that the cause of action did not fall within the meaning of the saving clause of that section of the Act, "other like matters or things where the rights in future may be bound" [15 Moo. P.C. 191, 192], but

* *Present:* THE RIGHT HON. LORD CHELMSFORD, THE RIGHT HON. THE LORD JUSTICE KNIGHT BRUCE, THE RIGHT HON. SIR EDWARD RYAN, and THE RIGHT HON. THE LORD JUSTICE TURNER.

(1) Quest. *re Marois*, *post*, p. 205. *Cushing* v. *Dupuy*, *post*, p. 260.

Secondly, in the circumstances, leave was granted, subject to a petition being presented by the Respondent, upon the competency of the appeal, upon which it might be dismissed as incompetent [15 Moo. P.C. 193, 194].

Observations upon the case of "*Cuvillier* v. *Aylwin*" (2 Knapp's P.C. Cases, 72), respecting the prerogative of the Crown, under section 43 of the 34th Geo. III., c. 6, Lower Canada Acts, to admit an appeal to England, notwithstanding the effect of the 30th section of that Act [15 Moo. P.C. 193].

This was an application for leave to appeal from a judgment of the Court of Queen's Bench of Lower Canada, affirming the judgment of the Superior Court at Quebec, by which the Petitioner was condemned, jointly together with two others, to pay a sum of £165 3s. 7d., with interest at 4½ per cent. from the 30th of April, 1855.

The petition stated, that one Etienne Alaire had sued the Petitioner and two others in the Superior Court at Quebec, as partners in a Banking establishment called the "*Caisse D'Economie de St. Roch*," to recover a sum of money deposited by Etienne Alaire with that establishment. The Petitioner, amongst other matters, pleaded, that he never was a partner in the Banking establishment, or a Director, or Manager of the Banking establishment, but was only a Clerk, or servant, employed by the Banking establishment. The petition then stated, that judgment was given against the Petitioner and his co-Defendants by the Superior Court at Quebec, for the sum of £165 3s. 7d., together with £4 10s. per cent. interest on the same, and that the Petitioner was also condemned to pay the costs; that the Petitioner appealed against this judgment to the Court of Queen's Bench of Lower Canada, which Court affirmed the judgment of the Superior Court at Quebec. That other depositors in the Bank had commenced actions against the Petitioner and the other co-Defendants, to recover the sums of money so deposited by them with that Banking establishment, amounting in all to the sum of £4242, and that if the judgment of the Court of Queen's Bench of Lower Canada were suffered to stand, the Petitioner would have no defence to the other several actions brought against him, and would be compelled to pay the sum of £4242.

15 *Moo. P.C.* p. 190.

The petition was heard *ex-parte*.

Mr. Montague Smith, Q.C., and Mr. Kerr, for the Petitioner.—The right of the Queen in Council to receive and hear appeals from Colonial Courts, on every subject, and whatever the amount at issue, is one of the prerogatives of the Crown, which cannot be taken away, without the express words of an Act of Parliament to which the Crown has given its assent (see upon this point, *The Queen* v. *Eduljee Byramjee* (5 Moore's P.C. Cases, 276), *The Queen* v. *Alloo Paroo* (*ib.* 296), *Christian* v. *Corren* (1 Peere William's, 329). The proviso in the 43rd

J. C. 1862

In re MAROIS. 15 *Moo. P.C. p.* 191.

section of the Lower Canada Act, 34th Geo. III. c. 6 (1), gives the Crown authority to admit an appeal which may be limited with respect to the appealable value prescribed by the 30th section (see *ante* [15 Moo. P.C.], p. 183) of that Act.—[Lord Chelmsford. The very point you now contend for was raised in *Cuvillier* v. *Aylwin* (2 Knapp's P.C. Cases, 72) and decided against your construction of that section.]—Then, we submit, that under the saving clause in the same section, we are entitled to be let in to appeal. The words "other matters and things where rights in future may be bound" meets precisely our case. Here there are several other actions pending which will be governed by this appeal, if admitted. It was upon the same ground that this Court admitted an appeal in Boswell v. Kilborn (12 Moore's P.C. Cases, 467) from Lower Canada, though, like this case, it was under the appealable value. The principle upon which this Tribunal proceeds is, that where there is an important point of law involved, though the appealable value is less than provided for by Charter, or instructions to the Governor, leave to appeal will be granted, *Spooner* v. *Juddos* (6 Moore's P.C. Cases, 257), *Castrique* v. *Buttigieg* (10 Moore's P.C. Cases, 103). Power is also given to the Crown by Statute, 4th Will. IV., c. 41, sec. 4, to refer any matter to this Tribunal to prevent a denial of justice. They also referred to *Re Cambridge* (3 Moore's P.C. Cases, 175) and *The Quebec Fire Assurance* v. *Anderson* (13 Moore's P.C. Cases, 477).

Judgment was delivered by

15 *Moo. P.C. p.* 192.

The Right Hon. Lord Chelmsford (Feb. 10, 1862).—This petition for leave to appeal depends upon the same Act of the Province of Lower Canada as the case of *Macfarlane* v. *Leclaire* (*ante* [15 Moo. P.C.], p. 181) from the Court of Queen's Bench at Montreal, which their Lordships have just disposed of (the 34th Geo. III., c. 6), but the questions raised in the two cases are entirely different. Upon the present petition it is not denied, that the matter in dispute is not of the value of £500, sterling, but the Petitioner prays that he may have leave to appeal granted to him under the special circumstances of his case. The sum actually recovered in the action against the Petitioner is only £165 3s. 7d. with interest at 4½ per cent., but he states that in consequence of his having been held to be liable to the Plaintiff in that action as a member of an incorporated society, carrying on a

(1) This proviso is as follows:—"That nothing herein contained shall be construed in any manner to derogate from the rights of the Crown, to erect, constitute, and appoint Courts of Civil or Criminal jurisdiction within this Province, and to appoint, from time to time, the Judges and Officers thereof, as His Majesty, his heirs, or successors, shall think necessary or proper, for the circumstances of this Province, or to derogate from any other right or prerogative of the Crown whatsoever."

Banking business for a loan or deposit made by the Plaintiff to or with the Banking Company, other depositors in the Bank have brought numerous actions against him, by which he is sought to be rendered liable to claims amounting to upwards of £4000. It was argued, but not very strongly pressed, that the existence of these actions following upon the judgment might possibly bring the case within the class of exceptions in the 30th section of the Act, and so entitle the Petitioner to appeal, although the immediate sum or value in dispute is less than £500. It would be difficult, however, without straining the words of the Act to make the exceptions apply to the Petitioner's case. But the Petitioner contends, that although he is precluded from an appeal in consequence of the insufficient value of the matter in dispute, and is unable to bring himself within the exceptions, that it is still open to him to apply to Her Majesty in Council for leave to appeal, and that the peculiar circumstances of his case justify the application.

15 *Moo. P.C.* p. 193.

He maintains that the jurisdiction by way of appeal from all Colonial Courts is a prerogative of the Crown, which cannot be taken away except by the express words of an Act of the Legislature to which the Crown has given its assent; and that in the Colonial Act in question, not only are there no words to take away the prerogative, but that it is expressly reserved by the 43rd section, in which it is declared that nothing in the Act contained shall be construed in any manner to derogate from certain specified rights of the Crown, "or from any other right or prerogative of the Crown whatsoever." But here the Petitioner is met by the case of *Cuvillier* v. *Aylwin* (2 Knapp's P.C. Cases, 72), (1) in which the very point which he raises was decided in the Privy Council against him. If the question is to be considered as concluded by that decision his petition must be at once dismissed; but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines, and he does not appear to have directly adverted to the effect of the proviso contained in the 43rd section of the Act on the prerogative of the Crown.

Their Lordships must not be considered as intimating any opinion, whether this decision can be sustained or not, but they desire not to be precluded by it from a further consideration of the serious and important question which it involves. The Petitioner must understand that the prayer of his petition will be granted, but at the risk of a petition being hereafter presented from the opposite party, upon which his appeal may be dismissed as incompetent.

15 *Moo. P.C.* p. 194.

(1) *Ante*, p. 198.

J. C. 1862

In re MAROIS.

Their Lordships will, therefore, humbly report to Her Majesty that leave ought to be granted to the Petitioner to enter and prosecute his appeal upon lodging a deposit of £300, in the registry of the Privy Council as security for the costs of the Respondent. (1)

L'UNION ST. JACQUES DE MONTREAL *v.* BÉLISLE
L.R., 6 P.C. 31.

J. C.* 1874 *July* 8.

[PRIVY COUNCIL.]

L'UNION ST. JACQUES DE MONTREAL. . DEFENDANT

AND

DAME JULIE BÉLISLE . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH IN LOWER CANADA, IN THE PROVINCE OF QUEBEC (APPEAL SIDE).

Distribution of Legislative Power—Legislature of Quebec.

Held that the Act of the Provincial Legislature of Quebec (33 Vict c. 58), which purported to relieve by legislation the appellant society, appearing on the face of the Act to have been in a state of extreme financial embarrassment, is within the legislative capacity of that Legislature.

The Act related expressly to "a matter merely of a local or private nature in the province," which, by the 92nd sect. of the *British North America Act*, 1867, passed by the Imperial Parliament, is assigned to the exclusive competency of the provincial legislature; and does not fall within the category of bankruptcy and insolvency, or any other class of subjects by the 91st section of the last mentioned Act reserved for the exclusive legislative authority of the Parliament of Canada.

The question decided in this appeal was whether the Act of the provincial legislature of *Quebec* (33 Vict. c. 58), is repugnant to the provisions of an Act of the Imperial Parliament, viz. the *British North America Act*, 1867. The Provincial Act, 33 Vict. c. 58, is as follows:—

"An Act to relieve *L'Union St. Jacques de Montreal.*

"Whereas there exists in the City of *Montreal* a benefit and benevolent society, duly incorporated, under the name of '*L'Union St. Jacques de Montreal;*' whereas the contributions levied on the members of such society are too limited, and the benefits, especially those granted to the widows of deceased members, are by far too high; and whereas such disproportion between the contributions and the benefits has already reduced considerably the resources

* *Present:*—LORD SELBORNE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) Ref. *Cushing* v. *Dupuy*, *post*, p. 261.

of the said society, remarkably encroached on its savings, and prevented the balancing of receipts and expenses, the latter having exceeded the former for more than three years; whereas the half of the widows of deceased members, to wit, two out of four, have understood such state of affairs, and have come to the relief of the said society by agreeing to allow their weekly and life benefits to be lessened, and to exchange the same against the allowance of a sum to be once paid, and having not exceeded $200 except for such of them who had not already received as such an equal sum of $200; whereas it would be unjust and altogether injurious to the interests of the said society to continue to pay weekly and life benefits to the two widows having refused to comply with the terms offered to the other widows and by them accepted; and whereas the said two widows persisting in their refusal have already received in the way of ordinary benefits, a sum exceeding that of $200; whereas it has been shewn that the financial condition of the said association does not permit of its continuing to pay to the two widows aforesaid their previous pensions, which, even if it were disposed, it could not do without entailing its own ruin; whereas the Act incorporating the said society does not allow to decree that the terms accepted by the two widows aforesaid shall be binding for all the widows of its deceased members; and whereas it is expedient to remedy such unfavourable state of affairs, as prayed for by the petition of the said society, and whereas it is just that the prayer of the said petition be granted; therefore, Her Majesty, by and with the advice and consent of the Legislature of *Quebec*, enacts as follows:

L.R., 6 *P.C.* *p.* 32.

"I. The said society, '*The Union St. Jacques of Montreal*,' is hereby authorized to convert, in the ordinary manner and forms of its proceedings, the benefits of the said two widows, to wit: Dame *Elizabeth Brunet*, widow of the late *Albert Tessier*, and Dame *Julie Bélisle*, widow of the late *Prosper Tourville*, into the sum of $200 to be once paid to each and all of them.

"II. If the said two widows, or one of them, refuse to accept such sum, instead of their or her prior benefit, it shall be lawful for the said society to keep such sum or sums in trust, and they shall only be bound to pay the said widows, for all the benefits to which they were previously entitled, the legal interest on the said sum of $200, that is to say, $12 to each of them, the said interest payable monthly and in advance up to their re-marriage or till their death, if they remain in a state of widowhood; it shall, nevertheless, be lawful for the said widows to draw the said allowance of $200 each, provided, of course, that they shall ask for it while in a state of widowhood.

L.R., 6 *P.C.* *p.* 33.

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L'UNION ST. JACQUES DE MONTREAL v. BELISLE.

"III. But if the said association, '*L'Union St. Jacques de Montreal*' sees its condition improve, and becomes possessed of assets, amounting to $10,000 in real estate, or in savings deposited in banks or otherwise invested, it shall be permissible to the two widows above named to demand from the said association the same contribution as heretofore (*7s. 6d.* per week), and also all arrears from this date, after deduction has been made of the $200 and the interest received by them on the same."

Under the Imperial Act *The British North America Act*, 1867, sect. 3, the provinces of *Canada*, *Nova Scotia*, and *New Brunswick*, form one dominion under the name of *Canada*, and under sect. 5, *Canada* is divided into four provinces, viz., *Ontario*, *Quebec*, *Nova Scotia*, and *New Brunswick*. A Parliament for *Canada* called the Dominion Parliament consisting of the Queen the Senate and the House of Commons is thereby established, and by sect. 71, a legislature for *Quebec* was established consisting of the Lieut.-Governor and of two Houses, styled the Legislative Council of *Quebec* and the Legislative Assembly of *Quebec*.

The material sections of the Imperial Act which effected the distribution of legislative power as between the Dominion Parliament and the local legislature, are the 91st and the 92nd. By the former, so far as is material to this case to refer to it, it was provided that it should be lawful for the Queen, with the advice and consent of the Dominion Legislature, to make laws on all subjects not coming within the class of subjects by that Act assigned exclusively to the legislature of the province, and for greater certainty, it was declared that the exclusive legislative authority of the Parliament of *Canada* should extend to all matters coming within certain classes of subjects, to wit, *inter alia*, bankruptcy and insolvency; and that any matter coming within the said classes of subjects should not be deemed to come within the class of "Matters of a local or private nature" mentioned in the next section. By the latter, it was provided that in each province the local legislature might exclusively make laws in relation to matters coming within certain classes of subjects therein mentioned, to wit, *inter alia:* 7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals. 11. The incorporation of companies with provincial objects. 13. Property and civil rights in the province. 16. Generally all matters of a merely local or private nature in the province.

L.R., 6 *P.C.* *p.* 34.

The question arose in this way. The Respondent, on the 25th of August, 1870, sued the Appellant Society in the Circuit Court

for the district of *Montreal*, to recover an instalment of an annuity to which she was admittedly entitled under the rules of the society. By special plea, the Appellant pleaded that by the Provincial Act above set out it was authorized to pay to the Respondent the sum of $200 in lieu of the benefits which she was entitled to receive from the society, and if she refused to accept it to place the sum in deposit, and pay to the Respondent the interest, viz. $12 a year monthly in advance during her life, or till her second marriage; and that the society had, at a general meeting, on the 10th of March, 1870, resolved to avail itself of the Act, and that it had always been ready and willing to pay the arrears to that date. The Respondent answered, that the Provincial Act should be declared illegal and unconstitutional. The Judge, on the 30th of November, 1870, gave judgment overruling the Appellant's plea, which judgment was affirmed on the 20th of September, 1872, by the Court of Queen's Bench (*Duval*, C.J., *Drummond* and *Monk*, JJ., *Caron*, and *Badgley*, JJ., dissenting). The majority of the Judges considered that the provincial legislature in passing the Provincial Act, had legislated on a matter coming within the class of "insolvency," which belonged under the 91st section of the Imperial Act to the exclusive authority of the Parliament of *Canada*.

Sir *W. Harcourt*, Q.C., and Mr. *Bompas*, for the Appellant.

Mr. *Benjamin*, Q.C., and Mr. *F. W. Gibbs*, for the Respondent.

The judgment of their Lordships was delivered by

LORD SELBORNE:—

The sole question in this appeal is this: whether the subject matter of the Provincial Act (33 Vict. c. 58), is one of those which by the 91st section of the Dominion Act are reserved exclusively for legislation by the Dominion Legislature. The scheme of the 91st and 92nd sections is this. By the 91st section some matters—and their Lordships may do well to assume, for the argument's sake, that they are all matters except those afterwards dealt with by the 92nd section—their Lordships do not decide it, but for the argument's sake they will assume it; certain matters, being upon that assumption all those which are not mentioned in the 92nd section are reserved for the exclusive legislation of the Parliament of *Canada*, called the Dominion Parliament; but beyond controversy there are certain other matters, not only not reserved for the Dominion Parliament, but assigned to the exclusive power and competency of the provincial legislature in each province. Among those the last is thus expressed: "Generally all matters of

C.R., 6 *P.C.* *p.* 35.

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L'UNION ST. JACQUES DE MONTREAL v. BELISLE.

a merely local or private nature in the province." If there is nothing to control that in the 91st section, it would seem manifest that the subject matter of this Act, the 33 Vict. c. 58, is a matter of a merely local or private nature in the province, because it relates to a benevolent or benefit society incorporated in the city of *Montreal* within the province, which appears to consist exclusively of members who would be subject *primâ facie* to the control of the provincial legislature. This Act deals solely with the affairs of that particular society, and in this manner:—taking notice of a certain state of embarrassment resulting from what it describes in substance as improvident regulations of the society, it imposes a forced commutation of their existing rights upon two widows, who at the time when that Act was passed were annuitants of the society under its rules, reserving to them the rights so cut down in the future possible event of the improvement up to a certain point of the affairs of the association. Clearly this matter is private; clearly it is local, so far as locality is to be considered, because it is in the province and in the city of *Montreal;* and unless, therefore, the general effect of that head of sect. 92 is for this purpose qualified by something in sect. 91, it is a matter not only within the competency, but within the exclusive competency of the provincial legislature. Now sect. 91 qualifies it undoubtedly, if it be within any one of the different classes of subjects there specially enumerated; because the last and concluding words of sect. 91 are: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces." But the *onus* is on the Respondent to shew that this, being of itself of a local or private nature, does also come within one or more of the classes of subjects specially enumerated in the 91st section.

L.R., 6 *P.C.* *p.* 36.

Now it has not been alleged that it comes within any other class of the subjects so enumerated except the 21st, "Bankruptcy and Insolvency;" and the question therefore is, whether this is a matter coming under that class 21, of bankruptcy and insolvency? Their Lordships observe that the scheme of enumeration in that section is, to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may be properly described as general legislation; such legislation as is well expressed by Mr. Justice *Caron* when he speaks of the general laws governing *Faillite*, bankruptcy and insolvency, all which are well

known legal terms expressing systems of legislation with which the subjects of this country, and probably of most other civilized countries, are perfectly familiar. The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation. Well, no such general law covering this particular association is alleged ever to have been passed by the Dominion. The hypothesis was suggested in argument by Mr. *Benjamin*, who certainly argued this case with his usual ingenuity and force, of a law having been previously passed by the Dominion Legislature, to the effect that any association of this particular kind throughout the Dominion, on certain specified conditions assumed to be exactly those which appear upon the face of this statute, should thereupon, *ipso facto*, fall under the legal administration in bankruptcy or insolvency (1). Their Lordships are by no means prepared to say that if any such law as that had been passed by the Dominion Legislature, it would have been beyond their competency: nor that, if it had been so passed, it would have been within the competency of the provincial legislature afterwards to take a particular association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency. But no such law ever has been passed; and to suggest the possibility of such a law as a reason why the power of the provincial legislature over this local and private association should be in abeyance or altogether taken away, is to make a suggestion which, if followed up to its consequences, would go very far to destroy that power in all cases.

L.R., 6 *P.C.* p. 37.

It was suggested, perhaps not very accurately, in the course of the argument, that upon the same principle no part of the land in the province upon the sea coasts could be dealt with, because, by possibility, it might be required for a lighthouse, and an Act might be passed by the Dominion Legislature to make a lighthouse there. That was not a happy illustration, because the whole of the sea coast is put within the exclusive cognizance of the Dominion Legislature by another article; but the principle of the illustration may be transferred to Article 7, which gives to the Dominion the exclusive right of legislating as to all matters coming under the head of "militia, military and naval service, and defence." Any part of the land in the province of *Quebec* might be taken by the

(1) Ref. *Citizens' Insurance Co.* v. *Parsons*, *post*, p. 282.

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L'UNION ST. JACQUES DE MONTREAL v. BELISLE.

Dominion Legislature for the purpose of military defence; and the argument is, if pushed to its consequences, that because this which has not been done as to some particular land might possibly have been done, therefore, it not having been done, all power over that land, and therefore over all the land in the province, is taken away, so far as relates to legislation concerning matters of a merely local or private nature. That, their Lordships think, is neither a necessary or reasonable, nor a just and proper construction. The fact that this particular society appears upon the face of the Provincial Act to have been in a state of embarrassment, and in such a financial condition that, unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not terminate the company; it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy; it does not wind it up. On the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity, and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be reinstated (1).

L.R., 6 *P.C.* *p.* 38.

Their Lordships are clearly of opinion that this is not an Act relating to bankruptcy and insolvency, and will therefore humbly advise Her Majesty that this appeal be allowed, that the judgment of the Court of Queen's Bench (*Canada*) ought to be reversed, and that the suit be dismissed. There will be no costs of this appeal.

Solicitors for the Appellant: Messrs. *Bischoff, Bompas, & Bischoff.*

Solicitors for the Respondent: Messrs. *Wilde, Berger, Thorn, & Wilde.*

J. C.* 1875 *March 5.*

DOW *v.* BLACK, L.R., 6 P.C. 272.

[PRIVY COUNCIL.]

JAMES DOW AND OTHERS . . . . . APPELLANTS;

AND

WILLIAM T. BLACK AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Distribution of Legislative Power—Legislature of New Brunswick.

Held, that the Act of the provincial legislature of *New Brunswick* (33 Vict. c. 47), intituled "an Act to authorize the issuing of debentures on the credit

* *Present*:—SIR JAMES W. COLVILE, THE LORD JUSTICE JAMES, THE LORD JUSTICE MELLISH, and SIR MONTAGUE E. SMITH.

(1) Appr. *Dow* v. *Black*, *post*, p. 221.

of the lower district of the parish of *St. Stephen*, in the county of *Charlotte*," which empowered the majority of the inhabitants of that parish to raise by local taxation a subsidy, designed to promote the construction of a railway extending beyond the limits of the province, but already authorized by statute, is within the legislative capacity of that legislature.

Under art. 2 of sect. 92 of the *British North America Act*, 1867, passed by the Imperial Parliament, the provincial legislature is enabled to impose direct taxation for a local purpose upon a particular locality within the province.

The Act in question relates to "a matter of a merely local or private nature in the province," which by the 92nd section of the Imperial Act is assigned to the exclusive competency of the provincial legislature, and does not relate to the railway, or any local work or undertaking within the excepted subjects mentioned in art. 10, sub-sect. (*a*) of the said section.

L'Union St. Jacques de Montreal v. *Dame Julie Bélisle* (1) approved.

The question decided in this appeal was whether the Act of the provincial legislature of *New Brunswick* (33 Vict. c. 47) is within the powers of that legislature according to the true construction of the Imperial Statute, the "*British North America Act*, 1867."

The Act in question, intituled "An Act to authorize the issuing of debentures on the credit of the lower district of the parish of *St. Stephen*," is, so far as is material for the present question, in the following terms:—

"Whereas the inhabitants of the town of *St. Stephen*, in the county of *Charlotte*, are desirous of having direct railway connection between *Houlton*, in the state of *Maine*, and the *St. Croix Valley*, in the county aforesaid; and whereas the town of *Houlton* has offered the *Houlton Branch Railway Company* a bonus of $30,000, upon condition that the said *Houlton Branch Railway Company* shall and do construct and suitably equip with necessary rolling stock a railway from the town of *Houlton* aforesaid to the line of the *New Brunswick and Canada Railway and Land Company*, at or near the *Debec Station* so called, and so that the said railway shall be completed and ready for the conveyance of passengers and freight on or before the 1st day of January in the year of our Lord 1872; and whereas the said *Houlton Branch Railway Company* are willing to undertake the building and construction of such connecting line of railway, and have the same completed and properly equipped for the conveyance of freight and passengers as aforesaid, within the time aforesaid, upon the conditions that the town of *St. Stephen* do and shall give to the said *Houlton Branch Railway Company* a bonus of $15,000; and whereas the inhabitants of that portion of the said town of *St. Stephen* called the

(1) *Ante*, p. 206.

J. C. 1875

DOW v. BLACK.

lower district, and hereinafter particularly described, are willing and desirous to give the said sum for the said purpose, and that the said sum should be raised upon the credit of the real and personal property of the inhabitants of the said lower district in such mode and manner as may be thought most advisable.

"Be it therefore enacted by the Lieutenant-Governor, Legislative Council, and Assembly as follows:—

"1. That upon the said *Houlton Branch Railway Company* giving reasonable and proper security to the justices of the peace in general sessions or special sessions called for that purpose, that the said line of railway from *Houlton* to the line of the said *New Brunswick and Canada Railway and Land Company* shall be built and efficiently furnished and completed, and substantially ready and fit for the conveyance of freight and passengers, and properly provided with all necessary locomotive engines, cars, and carriages, within the time aforesaid limited for so doing; such reasonable and proper security to be by bond under the hand and seal of not less than three responsible persons, resident and having property in this province, under the penalty of $40,000 conditioned as herein above stated, which said bond the said justices are hereby authorized to take and enforce by suit at law for breach thereof, if such shall occur; no person shall be accepted as such security until he shall have first made affidavit before some justice of the peace in the county of *Charlotte*, who is hereby authorized to administer such oath, to be filed in the office of the clerk of the peace for said county, that the value of his property in this province, over and above all his just debts and liabilities, is not less than $20,000; the said justices in general or special sessions shall forthwith issue and deliver, or cause to be issued and delivered, as a bonus to the said *Houlton Branch Railway Company*, certificates of debt to be called debentures to the amount of $15,000 in current money of the province of *New Brunswick*, of such denomination or denominations as they may see fit, to be numbered consecutively according to the denomination thereof, from number one upwards, of each denomination, with coupons annexed, bearing interest at 6 per centum per annum, payable semi-annually, at such place as shall be therein specified, and on such conditions and terms as shall be prescribed by the said justices in general or special sessions; the principal money of such debentures to be paid in full at the expiration of twenty years from the date thereof to the holders of the same, at such place and in such manner as shall be prescribed in the same.

L.R., 6 *P.C.* *p.* 274.

"2. The real and personal property of all persons, resident or

non-resident, situate in the lower district of *St. Stephen's* so called, described as follows (then follow the boundaries): 'Shall each and every year, during the continuance of the term of the said debentures, be assessed for the payment of the interest on such debentures, issued under the authority of this Act, an order for which assessment shall be made by the said justices in general or special sessions each and every year as aforesaid, and levied and collected in the same manner in all respects as parish and county rates are now or may be hereafter assessed, levied and collected, and when collected shall be paid into the *St. Stephen's Bank*, in the county of *Charlotte*, or such other place as may at first or at any subsequent period be selected by the said justices by order of the justices in general or special sessions to the collector of same for the purpose of paying the coupons on said debentures, which coupons shall be paid by the cashier of the said bank or other person selected as aforesaid, to the holders of such coupons, upon presentation thereof out of the funds so deposited.'"

L.R., 6 *P.C.* p. 275.

Sect. 3 of the Act provides for a similar assessment by order of the justices in general sessions, for the repayment of the principal sums due on the debentures within twenty years, but at such times and in such mode as the justices shall determine.

Sect. 4 provides for the form of debentures.

Sect. 5 provides for the summoning by two justices of a meeting of the ratepayers of the said lower district of the parish of *St. Stephen*, and enacts that the Act shall not come into force unless it is approved at such meeting by two-thirds of the ratepayers, but that if it is so approved the justices shall certify the same to the governor in council, and the governor shall thereupon announce the same by proclamation in the *Royal Gazette* of the province, and that thereupon the Act shall be *ipso facto* in full operation, force, and effect.

A meeting of the ratepayers of the said lower district of *St. Stephen* was held on the 11th of August, 1870, and the requisite majority of votes in favour of the Act was obtained and the debentures issued.

On the 14th of April, 1871, the justices of the peace at the general sessions for the county of *Charlotte* issued a warrant to the Appellants, the assessors of the parish of *St. Stephen*, commanding them to levy and assess $958. 50*c*. on the lower district of *St. Stephen*, to pay the interest on the said debentures.

The Appellants accordingly assessed the ratepayers of the district, and amongst others the Respondents, and the collector of rates applied to the Respondents for payment, which they refused.

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The Respondents thereupon applied for and obtained a writ of *certiorari* to remove into the Supreme Court the said warrant of assessment, and the assessment and all notices and documents upon which they were founded.

L.R., 6 *P.C.* *p.* 276.

A return, and subsequently an amended return, having been made, the Respondents applied for and obtained a rule *nisi* to quash the said warrant and assessment on the ground that the Act 33 Vict. c. 47, related to a railway extending beyond the limits of the province, and was therefore not within the competence of the provincial legislature of *New Brunswick*.

On the 22nd of February, 1873, the Supreme Court (*Ritchie*, C.J., *Allen* and *Weldon*, JJ.) gave judgment, making the rule absolute to quash the said warrant and assessment on the ground stated in the rule. *Fisher*, J., dissented on the grounds, first, that the Imperial Act, sect. 92, sub-sect. 10, paragraph (*a*), related only to railways between two provinces, and not to railways from a province into a foreign country; secondly, that the Court might presume that the money raised by debentures would be applied to the making of the part of the railway within the province, and that an Act to raise money for that purpose was within the competency of the provincial legislature.

Mr. *Benjamin*, Q.C., and Mr. *W. Grantham*, for the Appellants.

Mr. *Fry*, Q.C., and Mr. *Bompas*, for the Respondents.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This is an appeal against an order of the Supreme Court of the province of *New Brunswick*, making absolute a rule *nisi* that had been granted, and ordering that "the assessment made upon the lower district of the parish of *St. Stephen*, in the county of *Charlotte*, under and by virtue of a warrant of assessment issued to the assessors of the parish of *St. Stephen* by the general sessions of the peace in and for the county of *Charlotte* on the 14th day of April, 1871, directing the said assessors to assess upon the lower district of *St. Stephen* the sum of $958. 50*c.* for payment of interest upon debentures issued under the Act of Assembly, 33 Vict. c. 47, intituled 'An Act to authorize the issuing of debentures on the credit of the lower district of the parish of *St. Stephen*, in the county of *Charlotte*,' and the said warrant and all proceedings upon which the said assessment is based be absolutely quashed."

L.R., 6 *P.C.* *p.* 277.

The ground upon which the majority of the Judges constituting the Court proceeded, was that the Act of Assembly mentioned in the order was itself null and void, inasmuch as it had been passed by the provincial legislature of *New Brunswick*, which, on the true construction of the Imperial Statute, "*The British North America Act*, 1867," had no power to make such a law.

It is necessary, in order to deal with the arguments which have been addressed to their Lordships upon this appeal, to consider shortly under what circumstances this question arose. On the 10th of June, 1867, and before the Imperial Statute just mentioned came into operation, the then legislature of *New Brunswick* passed an Act, by the 6th section of which it was provided,—"That the sum of $5000 per mile, and not exceeding in the whole $17,500, should be granted for the construction of a branch line of railway to the boundary line of the state of *Maine*, from the railway leading from *St. Andrews* to *Woodstock*, to such person or persons or body corporate as shall construct the said road, upon its being proved to the satisfaction of the Governor in Council that a good and sufficient railway is constructed therein within four years from the passing of this Act, and in good working order for travel and traffic." That Act was followed by another passed a few days afterwards, viz., on the 17th June, by which certain persons were made and constituted a body corporate under the name of the Houlton Branch Railway Company, and were authorized to make and construct a railway running from the intersection of the *Woodstock* line of railway with the *New Brunswick and Canada Railway*, being a place known as *Debec*, to the boundary line of the state of *Maine* and the province of *New Brunswick*. The 5th section of that Act contains the following provisions—"The president, directors, and company for the time being are hereby authorized and empowered, by themselves or their agents, to exercise all the powers herein granted to the corporation for the purpose of locating and completing said railroads and branches, and for the transportation of persons, goods, and property of all descriptions; and all such power and authority for the management of the said corporation as may be necessary and proper to carry into effect the objects of this Act, to purchase or hold within or without the province lands, materials, engines, cars, and other necessary things, in the name of the corporation, for the use of the said road, and for the transportation of persons, goods, and property of all descriptions, and to make such connection with other railway companies within or without the province, either by leasing their road to other corporation or corporations,

L.R., 6 *P.C.* *p.* 278.

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on such terms and for such length of time as may be agreed upon, or by consolidating the stock of their road with that of other railway companies or companies, upon such terms as may be agreed upon;" and gives other powers to the new company.

Hence, on the 7th July, 1867, when "the *British North American Act*, 1867," came into operation, the *Houlton Branch Railway Company* had been duly incorporated, and by the Act of a competent legislature had been duly authorized to construct a railway from *Debec* to the frontier that divides the province from the state of *Maine*. Some years afterwards the Act, the validity of which is now called in question, being the 33 Vict. c. 47, was passed.

Its preamble recites that the town of *Houlton*, which is in the state of *Maine*, had offered the *Houlton Branch Railway Company* a bonus of $30,000, upon condition that the said *Houlton Branch Railway Company* should construct and suitably equip with necessary rolling stock a railway from the town of *Houlton* aforesaid to the line of the *New Brunswick and Canada Railway and Land Company*, at or near the *Debec* station, before the 1st of January, 1872; that the *Houlton Branch Railway Company* were willing to undertake the building and construction of such connecting line of railway, &c., and to have the same completed and properly equipped for the conveyance of freight and passengers as aforesaid within the time aforesaid, upon condition that the town of *St. Stephen*,—that being a town in the province of *New Brunswick*,—should give to the said *Houlton Branch Railway Company* a bonus of $15,000; and that the inhabitants of that portion of the said town of *St. Stephen* called the lower district, which was afterwards described, were willing and desirous to give the said sum for the said purpose, and that such sum should be raised upon the credit of the real and personal property of the inhabitants of the said district in such manner as might be thought most advisable. It clearly appears from these recitals that there was a desire, both on the part of the inhabitants of *Houlton*, in the state of *Maine*, and the inhabitants of that portion of *St. Stephen* in the province of *New Brunswick*, or some of them, that this line of communication between the two places should be completed; that its completion was considered to be for the benefit of both communities; and that a portion, at all events, of the inhabitants of that district of *St. Stephen*, in order to effect the arrangement, were willing to be taxed for the purpose of raising the bonus of $15,000 required by the *Houlton Branch Railway Company*. Accordingly the Act of Assembly provided for the carrying out of the arrangement in this way: It required the *Houlton Branch Railway Company* to give

L.R., 6 *P.C.* *p.* 279.

reasonable and proper security to the justices of the peace at general or special sessions for the completion of the work; and provided that thereupon the $15,000 should be raised by the issue of debentures to that amount payable twenty years after date, and carrying interest in the meantime. It further provided that the real and personal property of all persons resident in the lower district of *St. Stephen*, as defined by the Act, should be assessed in order to raise the interest on such debentures, and the principal when the latter should become due. But it also provided that the Act should not be in force until it had been accepted and approved by two-thirds at least of the ratepayers liable to be assessed thereunder, whose assent was to be obtained by the machinery thereby provided, and, when ascertained, was to be certified to the Governor in Council,—that is, the Governor-General in Council of *Canada*,—who was to announce the same by proclamation in the *Royal Gazette*. The Act in question was never disallowed by the Governor-General of *Canada;* all the formalities prescribed by it appear to have been complied with, and the assent of the requisite proportion of ratepayers to have been duly notified in the *Gazette*.

In this state of things it is to be presumed that the minority of the ratepayers which dissented from the arrangement was unwilling to pay the rate assessed upon them in order to meet the interest on the debentures, and raised this question before the Supreme Court. That Court issued a *certiorari* to remove the proceedings, and, upon the return of the *certiorari*, made the order *nisi*, which the order under appeal has made absolute.

L.R., 6 *P.C.* p. 280.

The grounds upon which the Supreme Court has pronounced this Act to be *ultra vires* of the local legislature are entirely derived from sub-sect. (*a*) of the 10th article of sect. 92 of the Imperial Statute. Sects. 91 and 92 purport to make a distribution of legislative powers between the Parliament of *Canada* and the provincial legislatures, sect. 91 giving a general power of legislation to the Parliament of *Canada*, subject only to the exception of such matters as by sect. 92 were made the subjects upon which the provincial legislatures were exclusively to legislate. The 10th article of sect. 92 among those subjects enumerates local works and undertakings other than such as are of the following classes. Then follow the exceptions, and the first of these is, lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province. A question touching the construction of this sub-

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section has been raised both here and in the Court below. The Respondents insist that the lines of railways which are thereby put within the exclusive jurisdiction of the Parliament of Canada are all railways which extend either beyond the limits of the province into other provinces within the dominion or into foreign countries. On the other hand, the Appellants contend that a more limited construction is to prevail, and that if the sub-section be taken in connection with the following sub-sect. (*b*), it will be found to apply only to railways extending beyond the limits of one province into another province of the dominion.

Their Lordships do not think it necessary to determine upon the present appeal this question of construction, or to affirm that if all the legislation that has taken place, including that for the incorporation of the *Houlton Railway Company*, and empowering it to make a railway to the frontier or beyond it, had taken place after the Imperial Statute of 1867 had come into operation, such legislation would have been within the powers of the provincial legislature. They do not think it necessary to determine that question, because they are of opinion that the validity of the Act of Assembly, the 33 Vict. c. 47, does not depend upon the sub-section in question. They are of opinion that the Act cannot be said to be a law in relation to a local work or undertaking within the fair and reasonable meaning of these words. The incorporation of the company, with its powers, and the construction of the railway up to the frontier, and therefore so far as any legislative power within the British dominions could determine that construction, had been already authorized by the Acts passed before the Imperial Statute came into operation. The Act now in question did not purport to enlarge the powers of the railway company, nor could it give them powers to be exercised on the foreign soil of *Maine*. Their Lordships consider that if the railway company had chosen to make an arrangement with the inhabitants of *Houlton*, in the state of *Maine*, for the construction of the railway on the terms of the bonus of $30,000 which had been offered to them from *Houlton*, there would have been no legal objection to their carrying out that arrangement. The Act was merely one which enabled the majority of the inhabitants of the parish of *St. Stephen* to raise by local taxation a subsidy designed to promote a work which they considered to be for the benefit of their town, and to place the inhabitants in a position to bargain and to act for their common benefit in the same manner as a private person might have thought it for his benefit to do. In substance and principle it does not differ from a private Act authorizing the trustees or

L. R., 6 *P.C.* *p.* 281.

guardians of a minor to let a warehouse to such a company. Supposing the work, instead of being a railway, had been a canal, and the inhabitants had been authorized to make a bargain for the supply of water to the district, could any doubt have been entertained on the subject? Their Lordships are therefore of opinion that no objection to the validity of the Act is to be found in the sub-section in question.

Another question has been raised for the first time at this Bar (for the objection does not appear to have been taken in the colonial Court), whether there was power in the provincial legislature to pass an Act by which such an assessment as this could be imposed on the town of *St. Stephen*.

It has been argued that whereas the 91st section reserves to the Parliament of *Canada* exclusive power of legislation in respect of, amongst other subjects, "The raising of money by any mode or system of taxation," the only qualifications imposed on that general reservation are to be found in the 2nd and 9th articles of the 92nd section. The latter has obviously no bearing on the present question. As to the former, it was contended that it authorizes direct taxation only for the purpose of raising a revenue for general provincial purposes, that is, taxation incident on the whole province for the general purposes of the whole province.

L.R., 6 *P.C.* p. 282.

Their Lordships see no ground for giving so limited a construction to this clause of the statute. They think it must be taken to enable the provincial legislature, whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province. They conceive that the 3rd article of sect. 91 is to be reconciled with the 2nd article of sect. 92, by treating the former as empowering the supreme legislature to raise revenue by any mode of taxation, whether direct or indirect; and the latter as confining the provincial legislature to direct taxation within the province for provincial purposes. Their Lordships are further of opinion, with Mr. Justice *Fisher*, the dissentient Judge in the Supreme Court, that the Act in question, even if it did not fall within the 2nd article, would clearly be a law relating to a matter of a merely local or private nature within the meaning of the 9th article of sect. 92 of the Imperial Statute; and therefore one which the provincial legislature was competent to pass, unless its subject-matter could be distinctly shewn to fall within one or other of the classes of subjects specially enumerated in the 91st section. This view is in accordance with the ruling of this tribunal in the recent case of the *L'Union St. Jacques de Montreal* v. *Dame Julie Bélisle* (1), decided on the 8th of July, 1874.

(1) *Ante*, p. 206.

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On these grounds their Lordships will humbly advise Her Majesty that the order under appeal be reversed, and that in lieu thereof an order be made discharging the rule *nisi*, which had been granted in Trinity Term, with costs. The Appellants will also have their costs of this appeal.

Solicitors for the Appellants: Messrs. *Upton, Johnson, Upton, & Budd.*

Solicitors for the Respondents: Messrs. *Bischoff, Bompas, & Bischoff.*

J. C.* 1878 *July* 5.

QUEBEC *v.* QUEEN INSURANCE CO. 3 APP. CAS. 1090.

[PRIVY COUNCIL.]

THE ATTORNEY-GENERAL FOR QUEBEC, PRO DOMINÂ REGINÂ . . . . . } PLAINTIFF;

AND

THE QUEEN INSURANCE COMPANY . . DEFENDANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

Powers of Provincial Legislature—British North America Act, 1867, *s.* 92, *sub-ss.* 2-9—*Quebec Act*, 39 *Vict. c.* 7—*Licenses—Stamps—Direct Taxation.*

The clauses of Act 39 Vict. c. 7 (passed by the Legislature of *Quebec*), which impose a tax upon certain policies of assurance and certain receipts or renewals, are not authorized by the *British North America Act*, 1867, s. 92, sub-ss. 2, 9.

A license Act by which a licensee is compelled neither to take out nor to pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee but by the person who deals with him, is virtually a Stamp Act and not a License Act.

The imposition of a stamp duty on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt in a Court of Law, if the stamp is not affixed, is not warranted by the terms of an Act which authorizes the imposition of direct taxation.

Appeal from a judgment of the Court of Queen's Bench above named (Dec. 14, 1877), affirming a judgment of the Superior Court

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and THE MASTER OF THE ROLLS (SIR G. JESSEL).

for *Lower Canada* sitting at *Montreal* (April 12, 1877), whereby the Appellant's action and demand were dismissed.

The action was for the recovery of three penalties of $50·00 each, incurred under the provisions of an Act of the Legislature of *Quebec*, intituled "An Act to compel Assurers to take out a License," being chapter 7 of the Statutes of *Quebec* of 1875 (39 Vict.), which received the royal assent on the 24th of December, 1875, and enacts in effect that every assurer carrying on in the province of *Quebec* any business of assurance other than that of marine assurance exclusively shall be bound to take out a license in each year, and that the price of such license shall consist in the payment to the Crown for the use of the province at the time of issue of any policy, or making or delivery of each premium receipt or renewal, of certain percentages on the amount received as premium on renewal of assurance, such payments to be made by means of adhesive stamps to be affixed on the policy of assurance, receipts, or renewals, and imposes for each contravention of the Act a penalty of $50.

3 *App. Cas.* *p.* 1091.

The question decided in this appeal is whether such Act of the Legislature of *Quebec* is constitutional and within the powers conferred upon that Legislature by the Act of the Imperial Parliament, called the *British North America Act*, 1867.

The sections or portions of sections of the *British North America Act*, 1867, material to this question are the following:—

"Sect. 91. It shall be lawful for the Queen by and with the consent of the Senate and House of Commons to make laws for the peace, order, and good government of *Canada*, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

"2. The regulation of trade and commerce.

"3. The raising of money by any mode or system of taxation.

"Sect. 92. In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

"2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.

"9. Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes."

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The material sections of the Act of the Legislature of *Quebec* are the following:—

"1. Every assurer carrying on in this province any business of assurance other than that of marine assurance exclusively, shall be bound to take out a license before the first day of May in each year from the revenue officer of the district wherein is situate his principal place of business, or head agency, and to remain continually under license.

3 *App. Cas.* *p.* 1092.

"2. The price of such license shall consist in the payment to the Crown for the use of the said province, at the time of the issue or delivery of any policy of assurance, except of marine assurance, and at the time of the making or delivery of each premium receipt or renewal, respecting any policy issued before or after the coming into force of this Act, of a sum computed at the rate of 3 per cent. as to assurances against fire, or of 1 per cent. as to other assurances for each $100 of the amount received as premium or renewal of assurance, by the assurer, his agent or employee.

"And such payment shall be made by means of one or more adhesive stamps equivalent in value to the amount required, to be affixed by the assurer, his agents, officers, or employees on the policy of assurance, receipt, or renewal, as the case may be, at the time of drawing up, issue, or delivery thereof.

"5. Every assurer bound to take out a license under the present Act, for whom or in whose name any policy of assurance, or any premium receipt or renewal, shall have been delivered without the same having been stamped to the amount required, shall be liable in each case to a penalty not exceeding $50, or in default of payment, unless such assurer be a corporation, to imprisonment not exceeding three months.

"8. The word "assurer' used in this Act, means and includes all persons, firms, corporations, and all companies, societies, or associations, whether incorporated or unincorporated, carrying on the business of assurance on life, or against fire or accidents, or the business of guaranteeing public functionaries or other employees, or any other assurance business whatsoever.

"10. The Act shall not affect any policy, premium receipt or renewal in relation to assurances wherever the interests assured are beyond the limits of this province."

The Respondent company is a corporation which carried on the business of insurance against fire in *Montreal*. It did not take out a license under the *Quebec Act*, 39 Vict. c. 7, but nevertheless issued three several policies of insurance mentioned in the declaration, and did not affix thereto the policy stamps required by the said Act.

3 *App. Cas.* *p.* 1093.

The action was brought on the 21st of September, 1876, to recover the penalties provided by the Act, viz., the sum of $150 currency.

The Respondents by their plea, after pleading the *British North America Act*, 1867, also pleaded *Canada Act*, 31 Vict. c. 48, and alleged, and it was admitted to be the fact, that they had deposited in the hands of the Receiver-General of the Dominion of *Canada* in manner provided by the last-mentioned Act, and by the subsequent amendment of that Act passed by the said Parliament of Canada, $150,000 for the purposes in the said Act described, and had given all the notices, performed all the formalities, and conformed themselves in all respects to the provisions of the said Acts and of the Act amending the same, and that they had obtained a license from the Minister of Finance of the Dominion of *Canada*, and were thereby licensed to carry on their business in *Canada* of fire and life insurance, that the said license remained in force until the 31st of March, 1876, and was then renewed by the Minister of Finance of the Dominion of *Canada* under and by virtue of the statutes in such case provided, until the 31st of March, 1877, and that at all times mentioned in the said declaration the Respondents were the holders of the license and extension of license issued under the above-mentioned Acts of the Parliament of *Canada* authorizing them to transact business of insurance in any part of the Dominion of *Canada*.

The Respondents by their said plea prayed that the said provisions of the said Act of the Legislature of *Quebec* might be declared to be unconstitutional and illegal, and in so far as respects the Respondents that they might be annulled and set aside and declared to be of no force or effect.

The Appellant in his answer to the Respondents' plea admitted that the Respondents were entitled to transact the business of insurance, and had conformed to the laws of the Dominion Parliament actually in force, but had not conformed to the law of the provincial Legislature, and he also maintained that the said Act of the Legislature of *Quebec* was constitutional, and that the said Legislature had a right to pass it, and that it was then the law of the land. 3 *App. Cas.* *p.* 1094.

From the notes of the reasons given by the learned Judges of the Court of Appeal, it appears that they agreed that the tax sought to be imposed was not a direct tax, and therefore did not come within sect. 92, sub-sect. 2 of the *British North America Act*, 1867.

Chief Justice *Dorion* considered that the tax was not within revenue raised by licenses under sub-sect. 9, and that the Act of the Legislature of *Quebec* clashed with the provision of the *British North America Act*, 1867, giving the Dominion Parliament the exclusive right to make laws for the regulation of trade.

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Mr. Justice *Monk* held that the provincial Legislature had not the power to impose licenses on insurance companies, no such power having been expressly given to it; and that the Dominion Legislature having exercised the power of licensing the Respondents, the provincial Legislature could not restrict the exercise of this power.

Mr. Justice *Tessier* considered that if the Legislature of *Quebec* had confined itself to imposing a license on insurance companies, such license might have been covered by sect. 92, sub-sect. 9 of the *British North America Act*, 1867, and been within the "other licenses," there specified. But the Legislature he held had gone beyond its jurisdiction in imposing penalties on the companies, and declaring that policies issued without stamps should have no effect, and thus hindering the companies from carrying on operations which they were licensed by the Dominion Government to carry on within the provinces.

Mr. Justice *Taschereau* said the claim of the provincial Legislature was founded upon sect. 92, sub-sect. 9, of the *British North America Act*, 1867. This tax, however, was not a license duty but a stamp duty, the license being introduced only to make the legislation fit in with the sub-section. The revenue was raised, not from the license but from the stamps, and as the sub-section expressly provided that the license was to be in order to the raising of a revenue, this was not such a license as was contemplated. He also considered that the words "other licenses" were limited by the foregoing words, and that insurance companies could not be said to be *ejusdem generis* with shops, &c. That if the provincial Legislatures had this power in regard to insurance companies they would have it in regard to banks, railway companies, &c., and under the form of a license their power of indirect taxation would become so great as to render unnecessary resort to direct taxation.

3 *App. Cas.* *p.* 1095.

Lastly, he argued the company was a commercial company, and the Act in question was repugnant to the clause of the *British North America Act*, 1867, reserving the regulation of trade and commerce to the Dominion Parliament.

Mr. Justice *Ramsay* considered that the exclusive power of taxation given to the Dominion Parliament by the *British North America Act*, was to employ any mode or system of taxation for general purposes, and that the tax in question was a license to assurers in order to raise revenue for provincial purposes. This purpose being legal he held that it was immaterial how the assurer was repaid, and that the license came within the "other licenses" mentioned in sect. 92, sub-sect. 9.

Mr. *Benjamin*, Q.C., and Mr. *Rigby*, for the Appellant, contended that the provisions of the *Quebec Act*, 39 Vict. c. 7, did not conflict or

interfere with the exclusive rights and powers of the Dominion Parliament. They referred to the *British North America Act*, 1867, sects. 91 and 92, which they contended were self-contradictory and very difficult of construction. The general scope of the Act is that the Dominion Parliament regulates public property, debt, and commerce. The general power of taxation, *i.e.*, the power of raising money for Dominion purposes, belongs to the Dominion Parliament. But special powers of taxation were also given to the provincial Legislature, and may co-exist with the more general powers of a similar class conferred on the Dominion Parliament. Those special powers when examined in detail shew the purpose of the Legislature. There is an express grant to the provincial Legislature (see sect. 92, sub-sect. 9), of a power to make laws relating to licenses, in order to the raising of a revenue for provincial, local, or municipal purposes. Having regard to sect. 129, it is necessary to refer to the powers of taxation granted by the Constitution of the *United States;* and on that subject, see *Hylton* v. *United States* (1), and License cases, *Thurlow* v. *Commonwealth of Massachusetts* (2). As to the legislation regarding licenses previous to the Act of 1867, and in reference to which that Act ought to be construed, see Consolidated Statutes, *Lower Canada*, p. 13, c. V.; and as respects the contention of the Respondent that it was an evasion to call this a license at all, see *Ibid.* pp. 13, 15, 22, 39, 44, 46. As regards the contention that the provincial Legislature was depriving the Respondent of rights conferred by *Canada Act*, 31 Vict. c. 48, that Act was a police regulation and not a Revenue Act, *cf.* English Act 34 Vict. c. 61. But if it were in contravention of the Dominion Act there was a power to disallow such statute, see *British North America Act*, 1867, sects. 56, 90. Reference was also made to 6 Geo. 4, c. 81; 6 Geo. 4, c. 58, s. 2.

3 *App. Cas.* p. 1096.

But even if this be not a license tax within sect. 92, sub-sect. 9, of the Act of 1867, it was direct taxation under sub-sect. 2 of sect. 92. It is impossible to classify scientifically direct and indirect taxes. It depends in each case upon the surrounding circumstances whether an apparently direct tax turns out to be indirect in its operation or *vice versâ*.

Mr. *Kay*, Q.C., and Mr. *F. W. Gibbs*, for the Respondent company, were not called upon.

The judgment of their Lordships was delivered by

THE MASTER OF THE ROLLS (Sir *G. Jessel*):—

In this case their Lordships do not intend to call upon the counsel for the Respondents.

(1) 3 Dallas, pp. 171, 182.

(2) 5 Howard's Rep. pp. 504, 574.

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ATTORNEY-GENERAL FOR QUEBEC v. QUEEN INSURANCE COMPANY.

This is an appeal from a judgment of the Court of Queen's Bench in *Canada*, affirming a judgment of the Superior Court of the Province of *Montreal*. The judgment appealed against was unanimous on one of the two points to which the appeal relates, and was decided by four Judges against one on the other. The real decision was that the clauses of a statute of the Province of *Quebec*, 39 Vict. c. 7, which imposed a tax upon certain policies of assurance, and certain receipts or renewals, were not authorized by the Union Act of *Canada, Nova Scotia*, and *New Brunswick*, which entrusted the province, or the Legislature of that province, with certain powers. And the sole question their Lordships intend to consider is, whether or not the powers conferred by the 92nd section of the Act in question are sufficient to authorize the statute which is under consideration?

3 *App. Cas.* p. 1097.

It is not absolutely necessary to decide in this case how far, if at all, the express enactments of the 92nd section of the Act are controlled by the provisions of the 91st section, because it may well be that, so far as regards the two provisions which their Lordships have to consider, namely, the sub-sections 2 and 9 of the 92nd section, those powers may co-exist with the powers conferred on the Legislature of the Dominion by the 91st section. Assuming that to be so, the question is, whether what has been done is authorized by those powers?

The first power to be considered, though not the first in order in the Act of Parliament, is the 9th sub-section. The Legislature of the province may exclusively make laws in relation to "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes." The statute in question purports to be, on the face of it, in exercise of that power. It enacts that every assurer, except people carrying on marine insurance, shall be bound to take out a license before the 1st day of May in each year, from the revenue officer of the district, and to remain continually under license. It then, by the 2nd section, enacts what the price of the license is to be. And reading it shortly, it amounts to this: that the price of the license shall consist of an adhesive stamp affixed to the policy, or receipt, or renewal, as the case may be. The amount of the adhesive stamp is to be, in the case of fire, 3 per cent., and 1 per cent. for other assurances on the premiums paid. Then the 4th section enacts that anybody who, on behalf of an assurer, shall deliver any policy, or renewal, or receipt, without the stamp, shall be liable for such contravention to a penalty of $50. The 5th section says that every assurer bound to take out a license shall be liable in such a case to a penalty not exceeding $50 if it has been delivered without an adhesive stamp. The 6th section says that every person who affixes the stamp shall be bound to cancel

3 *App. Cas.* p. 1098.

it so as to obliterate it, and prevent its being used again. And the 7th makes all policies, premium receipts or renewals, not stamped as required by the Act, invalid. It says they "shall not be invoked, and shall have no effect in law or in equity before the Courts of this Province." Then there are certain sections of the *Quebec License Act* which are incorporated, and the Act is not to apply to assurances not within the province. The only provision of the *Quebec License Act* which it is necessary to refer to is the 124th: "For every license issued by a revenue officer there shall be paid to such revenue officer, over and above the duty payable therefor, a fee of $1 by the person to whom it is issued."

Now, the first point which strikes their Lordships, and will strike every one, as regards this Licensing Act, is that it is a complete novelty. No such Licensing Act has ever been seen before. It purports to be a Licensing Act, but the licensee is not compelled to pay anything for the license, and, what is more singular, is not compelled to take out the license, because there is no penalty at all upon the licensee for not taking it up; and, further than that, if the policies are issued with the stamp, they appear to be valid, although no license has been taken out at all. The result, therefore, is, that a license is granted which there are no means of compelling the licensee to take, and which he pays nothing for if he does take; which is certainly a singular thing to be stated of a license. They say on the face of the statute, "The price of each license shall consist," and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps, and affixes them; or it may be that the assured buys the adhesive stamps, and affixes them, or pays an officer of the company the money necessary to purchase them and affix them; but whoever does it complies with the Act.

Another observation which may be made upon the Act is this: that if you leave out the clauses about the license, the effect of the Act remains the same. It is really nothing more nor less than a Stamp Act if you leave out those clauses. If you leave out every direction for taking out a license, and everything said about the price of a license, and merely leave the rest of the Act in, the Government of the province of *Quebec* obtains exactly the same amount by virtue of the statute as it does with the license clauses remaining in the statute. The penalty is on the issuing of the policy, receipt, or renewal; it is not a penalty for not taking out the license. The result therefore is this, that it is not in substance a License Act at all. It is nothing more or less than a simple Stamp

3 *App. Cas.* *p.* 1099.

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Act on policies, with provisions referring to a license, because, it must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license. (1)

If that is so, it is of no use considering how far, independently of these considerations, the 9th sub-section of the 92nd section would authorize a sum of money to be taken from an assurance company in respect of a license. With regard to the precedents cited, it was alleged, on behalf of the Appellants, that though at first sight it might appear that this was not a license, and that this was not the price paid for a license, yet it could be shewn by the existing legislation in *England* and *America* that licenses were constantly granted on similar terms; and that therefore in construing the Dominion Act we ought to construe it with reference to the other subsisting legislation. Their Lordships think that a very fair argument. But the question is, is it true in fact? When the instances which were produced were examined, it was found they were of a totally different character. They might be described as licenses granted to traders on payment of a sum of money; but the price to be paid by the trader was estimated either according to the amount of business done by the trader in the year previous to the granting of the license, or with reference to the value of the house in which the trader carried on business, or with reference to the nature of the goods, as regards quantity especially, sold by the trader in the previous year. They were all cases in which the price actually paid by the trader for the license at the time of granting it was ascertained by these considerations. It was a license paid for by the trader, and the actual price of the license was ascertained by the amount of the trade he did. This is not a payment depending in that sense on the amount of the trade previously done by the trader. It is a payment on the very transaction occurring in the year for which the license is taken out, and is not really a price paid for a license, but, as has been said before, a mere stamp on the policy, renewal, or receipt.

3 *App. Cas.* p. 1100.

As this is the result to which their Lordships come, it becomes necessary to consider the effect of the 2nd sub-section of the 92nd section. That authorizes "direct taxation within the province in order to the raising of a revenue for provincial purposes." The single point to be decided upon this is whether a Stamp Act,—an Act imposing a stamp on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt, in a Court of Law, if the stamp is not affixed,—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One

(1) Dist. *Bank of Toronto* v. *Lambe*, *post*, p. 385.

or other meaning the words must have; and in trying to find out their meaning we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the Court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the Courts of Law. Taken in either way there is a multitude of authorities to shew that such a stamp imposed by the Legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice *Taschereau* in his elaborate judgment it is not necessary here to do more than refer to. But surely if one could have been found in favour of the Appellants, it was the duty of the Appellants to call their Lordships' attention to it. No such case has been found. Their Lordships, therefore, think they are warranted in assuming that no such case exists. As regards judicial interpretation, there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice *Taschereau*. There, again, they are all one way. They all treat stamps either as indirect taxation, or as not being direct taxation. Again, no authority on the other side has been cited on the part of the Appellant.

Lastly, as regards the popular use of the word, two cyclopædias at least have been produced, shewing that the popular use of the word is entirely the same in this respect as the technical use of the word. And here, again, there is an utter deficiency on the part of the Appellants in producing a single instance to the contrary. That being so, it is not necessary, it appears to their Lordships, for them to consider the scientific definition of direct or indirect taxation. All that it is necessary for them to say is, that finding these words used in an Act of Parliament, and finding that all the then known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation, they must consider it was not the intention of the Legislature of *England* to include it in the term "direct taxation," and therefore that the imposition of this stamp duty is not warranted by the terms of the 2nd subsection of sect. 92 of the Dominion Act. That being so, it appears to their Lordships that the appeal fails, and they will, therefore, humbly advise Her Majesty to affirm the decision of the Court below, and dismiss the appeal.

3 *App. Cas.* p. 1101.

Solicitors for the Appellant: *Bischoff, Bompas, & Bischoff.*
Solicitors for the Respondent: *Wilde, Berger, Moore, & Wilde.*

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July 15, 16, 17, *Nov.* 22.

BELL *v.* QUEBEC, 5 APP. CAS. 84.

DAVID BELL . . . . . PLAINTIFF;

AND

THE CORPORATION OF QUEBEC . . . DEFENDANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

French Law in Quebec—Riparian Proprietors—Droit d'accès et de sortie—Navigable Rivers—Obstruction to Navigation—Damage

In an action for damages and to obtain the demolition of a bridge constructed by the Corporation of *Quebec* across the Little River *St. Charles*, on the ground that the bridge obstructed the navigation of the river and thereby caused damage to the Plaintiff as the owner of riparian land; it appeared that another bridge existed a short distance higher up the river, that the river was tidal beyond the higher bridge, and navigable for boats, flats, and rafts, and that it was possible at exceptionally high tides to float barges as far as the higher bridge, but that the difficulties and risks which from natural causes attended the navigation of craft of this description were so great that the river in its present state did not admit of their use in a practical and profitable manner; that the small boats, flats, and rafts, could be navigated as before, unobstructed by the bridge, although masted barges could not pass it without lowering their masts; that the Plaintiff's land was situated between the two bridges and was used as a farm, but was not proved to have been depreciated in value by reason of the bridge complained of, and that the Plaintiff was not proved to have sustained damage from actual interruption of traffic.

Held, that although there may be "*droit d'accès et de sortie*," belonging, according to French law as it prevails in *Quebec*, to riparian land as to a house in a street which, if interfered with, would at once give the proprietor a right of action; yet this right is confined to what it is expressed to be, "*accès*," or the power of getting from the water-way to and upon the land (and the converse) in a free and uninterrupted manner; that such right had not on the evidence been violated; and that supposing the bridge complained of to cause some obstruction to the navigation, the action could not be maintained in respect of it without proof of actual and special damage.

Lyon v. *Fishmongers' Company* (1) considered.

5 *App. Cas. p.* 85. Whether an obstruction amounts to an interference with a riparian proprietor's access to his frontage, which is a private right by English as by French law, is a question of fact to be determined by the circumstances of each particular case.

According to French law the test of the navigability of a river is its possible use for transport in some practical and profitable manner.

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* *Present:*—SIR BARNES PEACOCK, SIR MONTAGUE SMITH, and SIR ROBERT P. COLLIER.

(1) 1 App. Cas. 662.

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Appeal from a judgment of the Court of Queen's Bench (Sept. 8, 1877), affirming a judgment of the Superior Court (Nov. 8, 1876) which dismissed with costs the Appellant's action and demand.

This was an action *en démolition de nouvelles œuvres*, whereby the Appellant sought to procure the demolition and removal, and also damages occasioned by the erection of, a certain construction by the Respondent corporation over the River *St. Charles*, a tributary of the River *St. Lawrence*, for the purposes of the waterworks of the city of *Quebec*.

The facts of the case are set out in the judgment of their Lordships.

The declaration, filed on the 3rd of August, 1874, contained a count for the nuisance and obstruction, prayed that the same might be demolished and removed, and claimed $40,000 damages. The Corporation pleaded the general issue, and by *exception péremptoire en droit perpetuelle* set out several statutes (Provincial Statute of *Canada*, 10 Vict. c. 113, s. 28, amended by 13 & 14 Vict. c. 100, and 29 Vict. c. 57. s. 36, sub-s. 35) granting them permission to erect works for the purpose of supplying water to the City of *Quebec*, and for that purpose granting them power to expropriate property. It also pleaded that there had been no notice of action under Art. 22 of the Code of Civil Procedure, and a prescription of six months under the said statutes. The Appellant joined issue on these pleas.

On the 8th of November, 1876, the Superior Court (*Dorion*, J.) considering that the Plaintiff had not proved that the works complained of had caused any damage or prejudice to the Plaintiff, or were of a nature to cause him any such in future; and considering that the only damages which the Plaintiff had attempted to prove were future, uncertain, and inappreciable; and considering that the said works did not in any way prejudice the Plaintiff in the enjoyment and possession of the immoveable property described in the said declaration; and finally considering that for the above reasons the action of the Plaintiff was not sustainable, dismissed the same with costs.

5 *App. Cas.* p. 86.

The Court of Queen's Bench (*Dorion*, C.J., *Monk* and *Tessier*, J.J., *Ramsay*, J., dissenting) on the 8th of September, 1877, affirmed the judgment of the Superior Court upon the grounds given by that Court.

Mr. *Benjamin*, Q.C., and Mr. *J. C. Mathew*, for the Appellant:—

The evidence shews that the River *St. Charles* was navigable and tidal opposite the Appellant's property before the construction of the bridge in question, and that the bridge obstructs and

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impedes the navigation. It was navigable for laden "*bateaux*" as far as *Scott's Bridge* before the erection of the works in question, and it appeared that "*bateaux*" of upwards of sixty tons fully laden did from time to time ascend the river as far as that point and discharge their cargoes, sometimes on the Appellant's property and sometimes at *Scott's Bridge*. The Appellant, a bottle and earthenware manufacturer, had brought up in the course of his business several of the "*bateaux*" laden with coals, clay, and other materials to be used at his works. The *Quebec* Harbour Commissioners were shewn to have spent a large sum of money in improving the navigation of the river, which opposite the Appellant's property varied from 175 to 206 feet in width.

Then as to the question what is in law deemed to be a navigable river, reference was made to *Miles* v. *Rose* (1). The navigability of a river does not in law depend upon the extent of the user; it is none the less a navigable river because it may be difficult and expensive to secure and improve its navigability. It makes no difference whether a river is navigable all the year round or only at short intervals with respect to its character as a navigable river.

The statutes relied upon by the Respondent did not confer, and even if they purported to do so could not confer, any right upon the Respondents to obstruct or impede the navigation of the river: see *The State of Pennsylvania* v. *The Wheeling and Belmont Bridge Company* (2). With regard to damage, assuming the navigability of the river, the evidence shewed that the bridge was an obstruction.

5 *App. Cas. p.* 87.

By the law of *England* the presumption is that above the tide the river is private property, but that below the tide it is public property. [Mr. *Bompas*:—By French law the presumption is different.] Whatever use can be made of a public river in its natural state belongs to the public and cannot be obstructed: see *Angell* on Watercourses [6th Ed. 1869], § 537. The Appellant's damages were proved to be that his property was cut off from the navigation of the river by the bridge in question, and that the value of his land had been seriously diminished, and his communication with the city of *Quebec* cut off, and that he was and would thenceforth be obliged at considerable expense to carry by carts all goods required by him in his business: *Rose* v. *Miles* (3). Independently, moreover, of his right as one of the public to the free use and navigation of the river, entitling him on infringement thereof to recover special damages, the Appellant has a private right as riparian proprietor, and in respect thereof can maintain

(1) 5 Taunt. 705.

(2) 13 Howard Sup. Ct. Rep. 518.

(3) 4 M. & S. 101.

an action for its infringement without proof of actual, and still less of special or peculiar damage.

Reference was made to *Angell* on Watercourses, c. 13; *Hall* on Sea-shore, appendix, p. 5; *Hale's* Treatise, c. 3, "Concerning public streams;" *Hale*, c. 1, "Concerning the interest of fresh rivers;" *Beckett* v. *Midland Railway Company* (1), judgment of *Willes*, J.; *Metropolitan Board of Works* v. *M'Carthy*, judgments of Lords *Cairns* and *Penzance* (2); and *Lyon* v. *Fishmongers' Company* (3).

Mr. *Bompas*, Q.C., and Mr. *Rigby*, for the Corporation of *Quebec*:—

In reference to *Lyon* v. *Fishmongers' Company*, which was an English case decided by English law, the House of Lords attributed to riparian proprietors *quâ* owners larger rights than those of access to the waterway; it went further than the French law, which prevails in *Quebec*: see *Brown* v. *Gugy* (4). See further *Montreal* v. *Drummond* (5) and passages of *Demolombe* there cited. See further what took place in the lower Court in *Lyon* v. *Fishmongers' Company* (6). The question in that case was entirely one of access from the property to the river. Concurrent judgments of the Courts below have found that the Appellant had failed to shew that he had sustained or would sustain any injury from the Defendants' works; and without such proof this action is not maintainable. The local Acts 10 Vict. c. 113, since repealed, and 29 Vict. c. 57, a consolidation Act (with but little alteration), empowered the corporation to construct these works: see sect. 36 of the later Act. Even if the river were a navigable one, the corporation was only exercising its statutable rights, subject it may be to compensation to be awarded under the Act, but is not liable to be sued as a wrongdoer or to be called upon to take down the works complained of: see *Montreal* v. *Drummond* (5) and *Hawley* v. *Steele* (7). Further, the river is not a navigable one, *i.e.*, is not usable on the evidence for purposes of commerce: see *Dalloz*, *Répertoire*, *tit.* "*Eaux*," No. 39; *tit.* "*Voirie par eaux*," 52, 53. This river was neither navigated nor navigable; and consequently the bridge complained of causes no obstruction. The flow and reflow of the tide raises only a presumption of navigability: see *King* v. *Montague* (8).

5 App. Cas. p. 88.

Mr. *Benjamin* Q.C., replied.

(1) Law Rep. 3 C. P. 82.
(2) Law Rep. 7 H. L. 243.
(3) 1 App. Ca. 662.
(4) 2 Moore, P. C. (N. S.) 341, 357.
(5) 1 App. Cas. 384.
(6) Law Rep. 10 Ch. 689, 691.
(7) 6 Ch. D. 521.
(8) 4 B. & C. 598.

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BELL v. CORPORATION OF QUEBEC.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH :—

This is an appeal from the judgment of the Court of Queen's Bench for the province of *Quebec*, which affirmed the judgment of the Superior Court of the Province, dismissing the Appellant's action.

The action was brought for damages, and to obtain the demolition of a bridge, constructed by the corporation of *Quebec*, across the Little River *St. Charles*, a tributary of the *St. Lawrence*, on the ground that the bridge obstructed the navigation of the river, and thereby caused damage to the Appellant, as the owner of riparian land.

5 App. Cas. p. 89.

The bridge was built to carry an aqueduct, and formed a part of the works constructed by the corporation to carry water to *Quebec* for the use of the inhabitants.

The corporation was authorized to construct works for this purpose by an Act of the Legislature of *Canada*, 29 Vict. c. 57 (which was passed before the *British North America Act*, 1867). These powers are found in sect. 36 of the Act.

The place where the bridge complained of has been built is about two miles above *Quebec*, and a short distance only below another bridge crossing the *St. Charles*, called *Scott's Bridge*, constructed by the Government more than fifty years ago.

The Appellant's land lies on the south bank of the river between these two bridges, and is used for agricultural purposes. He and his brother, as partners, own land about half a mile above *Scott's Bridge*, where they carry on the business of potters, and have a pottery and clay pipe manufactory. The Appellant originally based his claim on the ownership of these works, as well as of the land below *Scott's Bridge*, but his claim in respect of the former was not insisted on at their Lordships' Bar, and the right to maintain the action was rested solely on his ownership of the land below *Scott's Bridge*.

The Court of Queen's Bench appears to have doubted whether the statute above referred to, though it authorized the construction of waterworks, which might be brought across the *St. Charles* would, if the action were otherwise maintainable, afford a sufficient defence to it, so far as it claimed damages. Mr. Justice *Tessier* was of opinion that it would be an answer to the claim for the demolition of the bridge.

The questions on which the decision below turned, and which were those principally argued upon the appeal, are, 1, whether and in what

degree the river is navigable at the place where the bridge has been built; 2, whether the Appellant has sustained special damage from its construction; and, 3, whether, without proof of such damage, the action is maintainable.

The river is tidal for some distance above *Scott's Bridge*, and is navigable for small boats and flats, and for rafts up to and beyond this bridge; but that it is navigable, in a practical and commercial sense, for larger craft, such as barges (*bateaux*), above the place where the bridge has been built, is controverted, and a great conflict is found in the evidence given at the hearing on this point. 5 *App. Cas.* p. 90.

The general character of the river at this place may be thus described,—numerous shoals exist in it, its bed is studded with rocks or boulders, which are a source of danger to any craft which may ground upon it, very high tides happen twice in the year, caused by the melting of the snow in spring, and by the rains in autumn, and it is only at the times of these extraordinary tides that barges can at all ascend the river, and then not without difficulty and danger of grounding. The proof of the actual employment of barges in this part of the river is very much what might be expected from this description. Throughout the period of twenty-seven years to which the evidence extends, a rare and intermittent use only has been shewn. Although numerous witnesses were called on the part of the Plaintiff, the instances spoken of were very few, with intervals of many years between them. In most of the cases the barges were said to have been brought up to the *Corporation Road*, which is just above the new bridge. Of those so brought up, about eight or ten were said to have conveyed clay and stores for Messrs. *Bell*, which were carted from the *Corporation Road* to their potteries above *Scott's Bridge*. For some years before the building of the bridge no barges appear to have gone above the place where it stands, and it was contended for the Defendants that the inference from these facts was that the employment of barges on this part of the river was neither useful nor profitable, and had practically been abandoned. It was attempted to account for the want of use of this part of the river by the fact of a strike of the bargemen, but this appears to be an insufficient explanation of it. On the part of the Defendants, numerous witnesses of good position and of great local experience, including the harbour master of *Quebec*, owners of barges, shipbuilders, and others, who lived on the banks of the river, or had business there, deposed that the river at and above the spot in question was not navigable for barges on account of the difficulties and dangers of the passage, and that in point of fact these vessels were not on this account employed to navigate it. Barge 5 *App. Cas.* p. 91.

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owners gave evidence that they would not allow their barges to make the passage, and declared that they could not be safely or profitably employed in that part of the river.

There was evidence to the effect that the bridge offered no obstruction to the passage of small boats, flats, and rafts, and the obstruction complained of principally was that barges with masts (which most of the *Quebec* barges carried) could not pass under it without striking or lowering their masts.

The Judge of the Superior Court based his judgment dismissing the suit upon the following *considérants*:—

"*Que le Demandeur n'a pas prouvé que les constructions faites par la Défenderesse sur la Rivière St. Charles, en vertu des pouvoirs à elle conférés par la loi, aient causé aucun dommage ou préjudice au dit Demandeur, ou soient de nature à lui en causer à l'avenir.*

"*Que les seuls dommages que le dit Demandeur ait cherché à prouver sont des dommages futurs, incertains et inappréciables.*

"*Que les dites constructions faites par la Défenderesse ne troublent en aucune manière le Demandeur dans sa jouissance et possession des immeubles décrits en la déclaration en cette cause.*"

Upon appeal to the Court of Queen's Bench, Chief Justice *Dorion*, after discussing the evidence and some French authorities on the subject, declared that all the circumstances led him to adopt the opinion of the witnesses who considered that the river was not navigable at the place where the bridge is built; but he was further of opinion, supposing the river to be navigable, that the Plaintiff had given no sufficient proof of actual or special injury from the construction of the bridge, which entitled him to maintain his action for its demolition or for damages.

Mr. Justice *Tessier* thought that the evidence of the most competent of the witnesses proved that this part of the river was not navigable in the true sense of the word, that it was "flottable" for small boats and rafts only, and that it was as much so since the construction of the bridge as before. He also agreed with the Chief Justice that, if the river was to be deemed navigable, the Plaintiff had not proved that he had sustained damage. Mr. Justice *Ramsay* dissented from his colleagues on both points, but stated that the Plaintiff's actual damage appeared to him to be very small.

5 *App. Cas. p.* 92.

The decision in this case is to be governed by the French law, as it prevails in the province of *Quebec*.

In the authorities referred to by the Judges below, and those cited at their Lordships' bar, the subject of navigable rivers is discussed principally with a view to determine the question whether a particular

river is or is not to be considered the domain of the Crown. The definitions attempted to be given are often vague, and sometimes contradictory.

In *Dalloz* (*Rép.* tit. "*Voirie par eau*") it is stated, No. 52:—

"*Il ne suffit pas pour qu'une rivière soit réputée navigable qu'elle soit en quelques points de son cours susceptible de porter bateaux; il faut qu'il puisse s'y établir une navigation régulière; que l'on puisse y naviguer librement, y circuler en bateaux, trains et radeaux, au moins pendant une partie de l'année.*"

At the end of the paragraph he says,—

"*En d'autres termes, la seule possibilité de naviguer sur un cours d'eau n'emporte pas pour le public le droit de naviguer; il faut possibilité et permanence dans une certaine mesure.*"

In No. 53, the same writer says,—

"*D'un autre côté, il n'est pas nécessaire pour qu'une rivière soit considérée comme navigable, qu'il y ait sur cette rivière une navigation effective et continuée; il suffit que la navigation y soit possible. Il a été décidé en ce sens qu'une rivière anciennement navigable ne cesse pas d'être comprise parmi les dépendances du domaine par cela seul que la navigation ou le flottage y aurait été interrompu depuis un temps plus ou moins long* (*Cons. d'Et.* 22 *Fev.* 1850, *aff. Dartigue, V. No.* 338, *V. aussi Cons. d'Et.* 5 *Août* 1829, *aff. Mirandol, V. Eaux, No.* 150)."

It is difficult to reconcile these two paragraphs.

The following is a passage from a *Traité des Cours d'Eaux*, by *Daviel*, vol. i., No. 36, p. 34:—

"*Mais un cours d'eau n'est réputé navigable parce que, d'un bord à l'autre, il existe un bac de passage, ou parce que quelques riverains, par pur agrément ou même pour l'exploitation de leurs fonds, se serviraient de bateaux. Il faut que d'amont en aval, il y ait navigation proprement dite, ou flottage en trains, et qu'en un mot, le cours d'eau fasse l'office de chemin et de voie de transport.*" 5 *App. Cas.* p. 93.

Dalloz adopts this view (*Rép.* tit. "*Eaux*," No. 39), he says:—"*Il ne suffit même pas qu'une rivière porte des batelets ou bacs pour le passage des personnes ou voitures, il faut qu'elle puisse être parcourue dans un espace assez considérable pour faire l'office de chemin et servir de moyen de transport.*"

These general definitions of *Daviel* and *Dalloz* shew that the question to be decided is, as from its nature it must be, one of fact in the

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particular case, namely, whether and how far the river can be practically employed for purposes of traffic. The French authorities evidently point to the possibility at least of the use of the river for transport in some practical and profitable way, as being the test of navigability.

Their Lordships, assisted in their appreciation of the evidence by the findings of the learned Judges below, are disposed to think the result of it to be, that the river is navigable for boats, flats, and rafts, and that it is possible, at the exceptionally high tides referred to, to float barges as high as *Scott's Bridge*, but that the difficulties and risks which from natural causes attend the navigation of craft of this description are so great that the river in its present state does not admit of their use in a practical and profitable manner.

Turning to the question of damage, and supposing the river to be navigable in the degree just indicated, their Lordships are not disposed to dissent from the conclusion of the two Courts below, that the Plaintiff has not sustained damage by the construction of the bridge.

It is not disputed that small boats, flats, and rafts can be navigated as before, unobstructed by the bridge. The interruption complained of is that masted barges cannot pass it without lowering their masts.

It has been already said that the Plaintiff's land is used as a farm, and there is no evidence that its occupiers ever employed barges for the purposes of the farm. No produce has been carried from it, and no manure or other things brought to it by such vessels. It does not even appear that in the few instances in which Messrs. *Bell* are shewn to have brought up clay for their potteries it was landed upon this farm. The barges were on one or two occasions brought into a little creek, part of which adjoins the farm, but the clay appears to have been discharged at the *Corporation Road*, which is outside it.

5 *App. Cas.* *p.* 94.

It is evident that the Plaintiff did not prove that he had sustained damage from actual interruption of traffic. This was scarcely denied, but it was contended that his farm was depreciated in value by reason of the bridge. Upon this question there was a great conflict of testimony. The witnesses for the Plaintiff formed their opinion in great measure on speculations of future changes in the use and employment of the property, and of artificial improvements which might be made in the river. This latter speculation cannot legitimately be imported into the consideration of the question. With regard to the Plaintiff's witnesses generally, the Courts below obviously distrusted their evidence, and refused assent to their

opinions. These witnesses failed to satisfy them that this farm, which has apparently no landing place, and whose owners had never used the river as a means of transport for conveying anything to or from it, was, having regard to the state of navigability of the river above described, really depreciated in value by the fact that masted barges would have to lower their masts to pass under the bridge.

Their Lordships understand the learned Judge of the Superior Court, who heard the witnesses, to base his judgment on the ground that no appreciable damage had been or would be caused to the Plaintiff's property by the construction of the bridge, and that judgment the Court of Queen's Bench has affirmed without altering the "*considérants*" on which it is founded. This tribunal usually accepts the concurrent findings of two Courts upon questions of fact, and their Lordships cannot say that sufficient reasons appear in the present case to warrant a departure from their rule.

The main contention, however, of the Appellant's counsel has been that the river, being, however imperfectly, navigable, the Appellant has a private right, belonging to him as riparian proprietor, to the free use and navigation of the river, independently of his right as one of the public, and that the construction of the bridge is an infringement of that right which entitles him to maintain an action without proof of actual, and still less of special and peculiar, damage. A case from *Lower Canada*, presenting this question, and not unlike in its circumstances to the present, came before this Committee some years ago. (*Brown* v. *Gugy* (1).) In that case the Plaintiff, the owner of land and a mill abutting upon the navigable River *Beaufort*, brought an action against the riparian owner on the opposite bank for erecting a wharf, which it was alleged obstructed the flow of the water to the Plaintiff's mill, and also the navigation of the river. The Plaintiff claimed damages and the demolition of the wharf. A great deal of conflicting evidence was given at the trial upon the question of the alleged obstruction. The judgment of the Superior Court contained the following *considérants* which bear on the question of law now under discussion:—"Considering that the River *Beaufort* is alleged and proved to be a navigable river, and that any obstruction of the same would be a public nuisance; and considering that no action by an individual lies for a public nuisance, unless the party bringing such action has received special and particular damage therefrom." The judgment goes on to state that the Court further considered that the Plaintiff had failed to prove any special or particular damage, and the suit was dismissed.

5 *App. Cas.* p. 95.

(1) 2 Moore, P. C. (N. S.) 341.

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No doubt the Court also found in that case that the Plaintiff had not proved that the wharf obstructed or diverted the natural course of the river, but the *considérants* above set out indicate the view of the Court that if an obstruction had been proved the action would require proof of special damage for its support. The Court of Queen's Bench affirmed this judgment, and upon the appeal to Her Majesty this Committee declined to interfere with the concurrent findings of the two Courts in *Canada* on the question of fact that the Plaintiff had failed to prove that the work would be injurious to him. Lord *Kingsdown*, however, in giving the judgment, discusses the law of *Canada* on the subject. He says:—"The law of *Lower Canada*, as we collect it from the authorities, seems to stand thus. An officer suing on behalf of the public has a right, at his own instance or on the application of any person interested, to call for the demolition of any work erected without license on the public domain, and he is no more required to prove that the erection has occasioned actual damage to the public than a private person who complains of a wrongful invasion of his property is obliged to prove that it has occasioned actual damage to him; but, although such an officer may, if he think proper, take proceedings to abate the nuisance, he is not obliged, nor is it in all cases his duty, to interfere. A case of this kind is put by *Proudhon* (*Traité du Domain Public*, tom. iii. p. 192, No. 820) in a passage cited by Mr. Justice *Aylwin*. He says: 'It may be that in the case of a dyke erected in the bed of a navigable river, the dyke may do no injury to the actual state of the navigation, as being built in an arm of the river where navigation is not practised, and which, nevertheless, does not on that account cease to be a part of the public domain.'"

5 *App. Cas. p.* 96.

The judgment proceeds:—

"If the public officer refuse to interfere, an individual who suffers injury is not prejudiced, he has still his "*action privée*," by which he may recover damages for injury already sustained, and the abatement of the cause of such injury for the future. The public and private action are said to be not only independent of each other, but essentially distinct in their object. The fact that the place where the work is erected is public property is of course very important in both cases, in regard to the right of the Defendant to do what he has done, but it does not, according to the law, as we can collect it from the authorities, supersede the necessity of the Plaintiff in a private action proving that he has sustained injury by the work special to himself, and beyond that which is common to the public at large, and this, as we have already stated, the Plaintiff in this case has failed to do."

In these passages the distinction between the "*action privée*,"

founded on a right of property which lies, if the right be invaded, without proof of damage, and the same action which arises only when the party is able to prove damage "special to himself," is plainly assumed to exist in the law of *Canada*, and to apply to cases analogous to that now under appeal. In the cited case, no doubt, the alleged obstruction was negatived, but the judgment is material for the view it presents of the law on the point now under discussion.

There appears to be a clear distinction in French law between rights of immediate access from a man's property to a highway, and the power to complain of a mere obstruction in it. In a case recently before this Board (*The Mayor of Montreal* v. *Drummond* (1)), the Plaintiff was the owner of houses in a public street in the city of *Montreal*, one end of which had been entirely stopped by the corporation. It was contended for the Plaintiff in that case that the right of passage through the street was a private right belonging to him as owner of these houses, and that the closing one end of the street was an interference with his property, and constituted "*une expropriation*" in respect of which he was entitled to previous compensation, and that this being unpaid, the act of the corporation was wrongful. It appears from the authorities cited in that case that the French law recognises "*droits d'accès ou de sortie*" as rights belonging to a house in a street, though the authorities differed as to whether a violation of these rights was to be regarded, for the purpose of indemnity, as "*une expropriation*," or as constituting only "*dommage*." It is evident that this right of access is different from the right of passage which the owner has in common with the public throughout the street; and the distinction is thus adverted to in their Lordships' judgment (2):—"The right of access to a house is, of course, essential to its enjoyment, and if by reason of alterations in the street the owner cannot get into or out of it, or is obstructed in doing so, there seems to be no doubt that by the law of *France* he is entitled to recover, in some form, indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these consequences." It is also said, "The counsel for the Plaintiff contended, indeed, that a right of passage throughout the entire street belonged to the owner of every house as a servitude, and undoubtedly they were able to refer to some authorities in favour of this view, but the weight of authority appears to be the other way." After referring to some of these authorities the judgment proceeds:—"It certainly then appears that in *France* the depreciation caused to a house by stopping one end of a street, supposing it to remain open at the other, is not regarded as an

5 *App. Cas.* p. 97.

(1) 1 App. Cas. 384. (2) Ibid. 406.

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interference with the servitude, nor (standing alone) such direct and immediate damage as will give a title to indemnity; and if this be so, there seems no reason or authority for declaring the law to be otherwise in *Canada*."

5 *App. Cas.* p. 98.

These principles appear to be applicable to the position of riparian proprietors upon a navigable river. There may be "*droit d'accès et de sortie*" belonging to riparian land, which, if interfered with, would at once give the proprietor a right of action, but this right appears to be confined to what it is expressed to be, "*accès*," or the power of getting from the water-way to and upon the land (and the converse) in a free and uninterrupted manner. Their Lordships think that this right has not, in fact, been violated in this case; and that, supposing the bridge to cause some obstruction to the navigation, the Courts below are right in holding that the Plaintiff is not entitled to maintain the action in respect of it without proof of actual and special damage.

The learned counsel for the Appellant, in support of their contention on this point, did not at all refer to French or Canadian authorities, but referred only to English and American decisions. These, though they may illustrate the subject, cannot be treated as governing authorities upon the law of the province.

The principal cases cited were: *Beckett* v. *Midland Railway Company* (1), *Metropolitan Board of Works* v. *McCarthy* (2), and *Lyon* v. *Fishmongers' Company* (3).

In the case in the Common Pleas the railway company had made an embankment in a public road in front of the Plaintiff's house, by which the width of the road was considerably diminished, and the immediate access to his house interfered with. It was found as a fact that the house was thereby permanently injured in value. The Court held that the special damage sustained by the Plaintiff beyond that of the rest of the public gave him a right of action, and consequently a right to compensation. The Court, however, evidently thought that it was necessary for the Plaintiff to prove special damage, so that this case, even in English law, is beside the point now under discussion.

In the *Metropolitan Board of Works* v. *McCarthy* the facts were that the Plaintiff was possessed of land, on which he carried on

5 *App. Cas.* p. 99.

trade, situate very near a draw dock in the *Thames*. This dock, which was much used by the Plaintiff for the purpose of his business, was wholly stopped up and destroyed by an embankment constructed by the Board, and the value of the land was thereby

(1) Law Rep. 3 C. P. 82. (2) Law Rep. 7 H. L. 243.
(3) 1 App. Cas. 662.

undoubtedly diminished. The House of Lords affirmed the judgments of the Court of Common Pleas and Exchequer Chamber given in favour of the Plaintiff. The Plaintiff was not strictly a riparian proprietor, and the decision again turned on the ground that the Plaintiff had sustained actual damage beyond that of the rest of the public. In this case the proximity of the Plaintiff's property to the dock was regarded; and no doubt the proximity of property to the highway must usually be a material element in the consideration of the question whether actual damage has in fact been caused to it by the obstruction.

In the *Caledonian Railway Company* v. *Ogilvy* (1) the House of Lords decided that the mere proximity of the claimant's house to the highway and to the obstruction did not create a particular damage which would give him a right of action. There the highway, which was the road by which the Plaintiff's house was approached, was obstructed by the railway being made to cross it on a level within a few yards of his lodge and entrance gate. This level crossing, though it undoubtedly created an obstruction very close to the entrance gate, which rendered the use of the road by those occupying the house constantly liable to interruption and delay, did not affect the immediate access to it, and though a jury had assessed compensation for the damage caused by this obstruction, it was held that the claimant had not sustained particular injury different in kind from that of the rest of the public, and his claim was disallowed.

The case most relied on by the Appellant's counsel was *Lyon* v. *The Fishmongers' Company* (2) in the House of Lords. There the Plaintiff was owner of a wharf on the *Thames*. One of its sides abutted on a tidal inlet which allowed of barges being brought up to and loaded and unloaded from and upon that side of the wharf. Under a license from the Conservators of the *Thames* the Defendants made an embankment fronting the river which entirely filled up the mouth of the inlet, and consequently prevented all access from it to the Plaintiff's wharf. The Act of Parliament which empowered the Conservators to grant the license contained a saving of the rights of owners of lands on the banks of the river. The question to be decided was, whether the right of access from the inlet to the wharf was a private right which fell within this saving, and the House, overruling the decision of the Lords Justices, held that it was. The learned counsel sought to press the authority of this case beyond the point which arose for adjudication, and treated it as an authority for the proposition that every riparian proprietor, as such, has, beyond his right as one of the public, a right to the use of the river in a free

5 *App. Cas.* p. 100.

(1) 2 Macq. Sc. App. 229. (2) 1 App. Cas. 662.

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and uninterrupted manner, so that any obstruction placed in it would be an invasion of a private right, for which an action would lie, without proof of special or even of actual damage. It would obviously be very difficult to assign the limits of such a right, if it were established, especially in large rivers. Upon consideration of the opinions of the learned Lords, it does not seem to this Committee that their decision can be pressed to this extent. The distinction between the right of access from the river to a riparian frontage and the right of navigation when upon it is more than once adverted to, particularly by the Lord Chancellor, who referred, certainly not with disapproval, to the judgment of Lord *Hatherley*, when Vice-Chancellor, in the case of *The Attorney-General* v. *The Conservators of the Thames* (1), where that distinction is pointedly taken and acted upon. Whether an obstruction amounts to an interference with the access to the frontage would be a question of fact to be determined by the circumstances of each particular case. When this access is not interrupted, and the waterway of the river is open to the riparian land, the question will arise for decision whether the right of action of the riparian proprietor for a distant obstruction in the river can be based on higher or other ground than would be that of any one of the public using the river and sustaining special damage; though his being such proprietor would obviously be an important element in the question whether such damage had in fact been sustained.

The House of Lords undoubtedly decided that the right of access to the waterway from riparian land is a private right which the owner of such land enjoys *quâ* owner. Such a right is analogous to the "*droits d'accès et de sortie*" recognised by the French law. If, as it was contended, the English law attributes larger rights than these to riparian proprietors on navigable rivers, it would seem to go further in this direction than the law of *Canada*, according to which the case now under appeal has to be determined.

5 *App. Cas.* p. 101.

Their Lordships, considering that the bridge in question does not in fact interfere with the access to the Plaintiff's land, and therefore that by the law of *Canada* it was necessary for the Plaintiff to prove actual and special damage arising from it, and not disagreeing with the concurrent judgments of the Courts below that no such damage has been established, are of opinion that those judgments ought to be affirmed, and they will humbly advise Her Majesty accordingly.

The Appellant must pay the costs of this appeal.

Solicitors for Appellant: *Hollams, Son, & Coward.*
Solicitors for Respondent: *Bischoff, Bompas, & Bischoff.*

(1) 1 H. & M. 1.

VALIN *v.* LANGLOIS, 5 APP. CAS. 115. J. C.* 1879 Dec. 13.

PIERRE VINCENT VALIN . . . . . APPELLANT;

AND

JEAN LANGLOIS . . . . . RESPONDENT.

IN RE PETITION OF PIERRE VINCENT VALIN.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *s.* 92, *sub-s.* 14—*Canada Statute*, 37 *Vict. c.* 10—*Distribution of Legislative Power—Jurisdiction of Superior Court—Election Petitions.*

The *Dominion Controverted Elections Act* of 1874 (Canadian Statute, 37 Vict. c. 10) does not contravene sect. 92, sub-sect. 14, of the *British North America Act*, 1867.

The said sub-section does not relate to election petitions, while sect. 41 of the same Act reserved to the Parliament of *Canada* the power of creating a jurisdiction to determine them.

The Parliament of *Canada* has power to commit such jurisdiction to existing Provincial Courts.

Special leave refused to appeal from two concurrent judgments of the Courts in *Canada* affirming the competency and validity of the said Act of 1874; it appearing that there was no substantial question requiring to be determined, nor any doubt of the soundness of the decisions, nor any reason to apprehend difficulty or disturbance from leaving the decisions untouched.

This was a petition of special leave to appeal from a judgment of the Supreme Court of *Canada* (Oct. 28, 1879), affirming a judgment of the Chief Justice of the Superior Court of *Quebec* (Jan. 1879), dismissing certain preliminary objections of the Petitioner to an election petition filed against him by the Respondent. The election petition prayed that *Valin's* election to a seat in the Canadian House of Commons for *Montmorency* might be declared null and void for bribery practised by himself and his agents to his knowledge and with his consent. The objections were that the Superior Court of the Province of *Quebec* had no jurisdiction to entertain an election petition.

5 *App. Cas.* p. 116.

Mr. *Benjamin*, Q.C. (Mr. *Gainsford Bruce* with him), in support of the petition, urged that the appeal raised a question of very great importance, and one which had given rise to much conflict of opinion, viz., as to the validity of Act 37 Vict. c. 10. Though the Judges in this case were unanimous in upholding its validity, yet a different view has been taken by other Judges in other provinces. In the

* *Present:*—LORD SELBORNE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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province of *Quebec*, it was stated that all the contestations had been suspended, the Judges awaiting the decision of the Privy Council before proceeding any further. With regard to the jurisdiction of the Superior Court in this case reference was made to the *British North America Act* (30 Vict. c. 3), ss. 41, 91, 92, sub-s. 14, 101, and to 36 Vict. c. 28, which makes provision for the trial of election petitions, and was repealed by 47 Vict. c. 10. See sects. 3, 33, 34, and 35 of the last-mentioned Act. See also 38 Vict. c. 11, ss. 47, 48. He submitted that the Parliament of *Canada* had, under the Imperial Act of 1867, no power to make laws in relation to the administration of justice in the province of *Quebec*, or to the constitution of any provincial Courts, or to procedure in those Courts. Consequently it had no power to confer any new jurisdiction upon the Superior Court, or to affect its procedure, or to impose new duties on its Judges; and therefore the Canadian Act of 1874 (37 Vict. c. 10) was *ultra vires* and inoperative. The Act of 1875, providing for appeals from decisions of the Superior Court under the Act of 1874, would stand or fall with the latter Act.

The judgment of their Lordships was delivered by

LORD SELBORNE:—

5 *App. Cas.* *p.* 117.

Their Lordships have carefully considered the able argument which they have heard from Mr. *Benjamin*, and they feel glad that so full an argument has been offered to them, because there can be no doubt that the matter is one of great importance. The petition is to obtain leave to appeal from two concurrent judgments of the Court of first instance and of the Court of Appeal affirming the competency and validity of an Act of the Dominion Legislature of *Canada*. Nothing can be of more importance, certainly, than a question of that nature, and the subject-matter also, being the mode of determining election petitions in cases of controverted elections to seats in the Parliament of *Canada*, is beyond all doubt of the greatest general importance. It therefore would have been very unsatisfactory to their Lordships to be obliged to dispose of such an application without at least having had the grounds of it very fully presented to them. That has been done, and I think I may venture to say for their Lordships generally that they very much doubt whether, if there had been an appeal and counsel present on both sides, the grounds on which an appeal would have been supported, or might have been supported, could have been better presented to their Lordships than they have been upon the present occasion by Mr. *Benjamin*.

In that state of the case their Lordships must remember on what principles an application of this sort should be granted or

refused. It has been rendered necessary, by the legislation which has taken place in the colony, to make a special application to the Crown in such a case for leave to appeal; and their Lordships have decided on a former occasion that a special application of that kind should not be lightly or very easily granted; that it is necessary to shew both that the matter is one of importance, and also that there is really a substantial question to be determined. It has been already said that their Lordships have no doubt about the importance of this question, but the consideration of its importance and the nature of the question tell both ways. On the one hand those considerations would undoubtedly make it right to permit an appeal, if it were shewn to their Lordships, *primâ facie* at all events, that there was a serious and a substantial question requiring to be determined. On the other hand, the same considerations make it unfit and inexpedient to throw doubt upon a great question of Constitutional Law in *Canada*, and upon a decision in the Court of Appeal there, unless their Lordships are satisfied that there is, *primâ facie*, a serious and a substantial question requiring to be determined. Their Lordships are not satisfied in this case that there is any such question, inasmuch as they entertain no doubt that the decisions of the Lower Courts were correct. It is not to be presumed that the Legislature of the dominion has exceeded its powers, unless upon grounds really of a serious character. In the present case their Lordships find that the subject-matter of this controversy, that is, the determination of the way in which questions of this nature are to be decided, as to the validity of the returns of members to the Canadian Parliament, is, beyond all doubt, placed within the authority and the legislative power of the Dominion Parliament by the 41st section of the Act of 1867, to which reference has been made; upon that point no controversy is raised. The controversy is solely whether the power which that Parliament possesses of making provision for the mode of determining such questions has been competently or incompetently exercised. The only ground on which it is alleged to have been incompetently exercised is that by the 91st and 92nd clauses of the Act of 1867, which distribute legislative powers between the Provincial and the Dominion Legislatures, the Dominion Parliament is excluded from the power of legislating on any matters coming within those classes of subjects which are assigned exclusively to the Legislatures of the provinces. One of those classes of subjects is defined in these words by the 14th sub-section of the 92nd clause: "The administration of justice in the province, including the constitution, maintenance, and organization of Provincial Courts both of Civil and

5 *App. Cas.* p. 118.

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of Criminal Jurisdiction, and including procedure in civil matters in those Courts." The argument, and the sole argument, which has been offered to their Lordships to induce them to come to the conclusion that there is here a serious question to be determined, is that the Act of 1874, the validity of which is challenged, contravenes that particular provision of the 92nd section, which exclusively assigns to the Provincial Legislatures the power of legislating for the administration of justice in the provinces, including the constitution, maintenance, and organization of Provincial Courts of Civil and Criminal Jurisdiction, and including procedure in civil (not in criminal) matters in those Courts. Now if their Lordships had for the first time, and without any assistance from any thing which has taken place in the colony, to apply their minds to that matter, and even if the 41st section were not in the Act, it would not be quite plain to them that the transfer of the jurisdiction to determine upon the right to seats in the Canadian Legislature,—a thing which had been always done, not by Courts of Justice, but otherwise,—would come within the natural import of those general words: "The administration of justice in the province, and the constitution, maintenance, and organisation of Provincial Courts, and procedure in civil matters in those Courts." But one thing at least is clear that those words do not point expressly or by any necessary implication to the particular subject of election petitions; and when we find in the same Act another clause which deals expressly with those petitions there is not the smallest difficulty in taking the two clauses together and placing upon them both a consistent construction. That other clause, the 41st, expressly says that the old mode of determining this class of questions was to continue until the Parliament of *Canada* should otherwise provide. It was therefore the Parliament of *Canada* which was otherwise to provide. It did otherwise provide by the Act of 1873, which Act it afterwards altered, and then passed the Act now in question. So far it would appear to their Lordships very difficult to suggest any ground upon which the competency of the Parliament of *Canada* so to legislate could be called in question. But the ground which is suggested is this, that it has seemed fit to the Parliament of *Canada* to confer the jurisdiction necessary for the trial of election petitions upon Courts of ordinary jurisdiction in the provinces, and it is said that although the Parliament of *Canada* might have provided in any other manner for those trials, and might have created any new Courts for this purpose, it could not commit the exercise of such a new jurisdiction to any existing Provincial Court. After all their Lordships have heard from Mr. *Benjamin*, they are at a loss to follow that argument, even supposing that this were not in truth and in

5 *App. Cas.* *p.* 119.

substance the creation of a new Court. If the subject-matter is within the jurisdiction of the Dominion Parliament, it is not within the jurisdiction of the Provincial Parliament, and that which is excluded by the 91st section from the jurisdiction of the Dominion Parliament is not anything else than matters coming within the classes of subjects assigned exclusively to the Legislatures of the provinces. The only material class of subjects relates to the administration of justice in the provinces, which, read with the 41st section, cannot be reasonably taken to have anything to do with election petitions. There is therefore nothing here to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or to give them new powers, as to matters which do not come within the classes of subjects assigned exclusively to the Legislatures of the provinces. But in addition to that, it appears that by the Act of 1873, which, even by those Judges who are said to have disputed the competency of the Act of 1874, is admitted to have been competent to the Dominion Parliament, what appears to their Lordships to be exactly the same thing in substance, and not so very different even in form, was done. It was intended that when a Court of Appeal should be constituted for the dominion, a Judge of that Court of Appeal should be the Judge in the first instance of election petitions, and three Judges of the same Court should have power to sit in appeal from any judgment of a single Judge. But it was necessary also to provide for the interval between the passing of the Act and the constitution of such a Court of Appeal; and that Act of 1873 provided that in the meantime the Judges of the existing Provincial Courts should exercise, under regulations contained in it, the same jurisdiction. It did not indeed say the Courts; it said the Judges of the Courts; and that is really in their Lordships' view the sole difference, for this purpose, between the Act of 1873 and the Act of 1874. The Act of 1874 in substance does the same thing, except that in the definition clause it uses this language: "The expression 'the Court,' as respects elections in the several provinces hereinafter mentioned respectively, shall mean the Courts hereinafter mentioned or any Judges thereof;" and then it mentions by their known names the existing Courts of the different provinces. When their Lordships go on to look at the provisions which follow in the Act, it is clear not only that a new jurisdiction is conferred upon those Courts, but that everything necessary for the exercise of that new jurisdiction is provided for, even the power to take evidence; it is said that a single Judge in rotation,

5 *App. Cas.* *p.* 120.

5 *App. Cas.* *p.* 121.

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and not the entire Court, is to exercise that jurisdiction; and in the 48th section,—"That on the trial of an election petition, and in other proceedings under this Act, the Judge shall, subject to the provisions of this Act, have the same powers of jurisdiction and authority as a Judge of one of the Superior Courts of Law or Equity for the Province in which such election is held, sitting in term or proceeding at the trial of an ordinary civil suit, and the Court held by him in such trial shall be a Court of Record." Words could not be more plain than those to create this as a new Court of Record, and not the old Court with some superadded jurisdiction to be exercised as if it had been part of its old jurisdiction. And all that is said as to the employment of the same officers, or of any other machinery of the Court for certain purposes defined by reference to the existing procedure of the Courts,—shews that the Dominion Legislature was throughout dealing with this as a new jurisdiction created by itself; although in many respects adopting, as it was convenient that it should adopt, existing machinery. Therefore their Lordships see nothing but a nominal, a verbal, and an unsubstantial distinction between this latter Act, as to its principle, and those provisions of the former Act which all the Judges of all the Courts in *Canada*, apparently without difficulty, held to be lawful and constitutional.

Then their Lordships are told that some of the Judges of the Courts of first instance have thought there was more of substance in the distinction than there appears to their Lordships to be, and have declined to exercise this jurisdiction. It has been said that five Judges have been of that opinion. On the other hand, two Judges of first instance—I think both in the province of *Quebec*, the Chief Justice, in the present case, and in another case, Mr. Justice *Caron*, a Judge whose experience on the Canadian Bench has been long, and whose reputation is high,—have been of opinion that this law was perfectly within the competency of the Dominion Legislature, and they could see nothing in the distinction taken between the present law, as to its principle, and the former. And now the question has gone to the Court of Appeal, the Supreme Court of *Canada*, which, constituted as a full Court of four Judges, has unanimously been of that opinion; and nothing has been stated to their Lordships, even from those sources of information with which Mr. *Benjamin* has been supplied, and which he has very properly communicated to their Lordships; nothing has been stated to lead their Lordships at all to apprehend that there is any real probability that any Judge of the inferior Courts will hereafter dispute their obligation to follow the ruling of the

5 *App. Cas.* p. 122.

Supreme Court, unless and until it shall be reversed by Her Majesty in Council; nothing has been said from which their Lordships can infer that any provincial Legislature is likely to offer any opposition to such a ruling on this question as has taken place by the Court of Appeal, unless, as has been said, it should at any future time be reversed by Her Majesty in Council.

Under these circumstances their Lordships are not persuaded that there is any reason to apprehend difficulty or disturbance from leaving untouched the decision of the Court of Appeal. Their Lordships are not convinced that there is any reason to expect that any of the Judges of the Court below will act otherwise than in due subordination to the appellate jurisdiction, or refuse to follow the law as laid down by it. If indeed the able arguments which have been offered had produced in the minds of any of their Lordships any doubt of the soundness of the decision of the Court of Appeal, their Lordships would have felt it their duty to advise Her Majesty to grant the leave which is now asked for; but, on the contrary, the result of the whole argument has been to leave their Lordships under the impression that there is here no substantial question at all to be determined, and that it would be much more likely to unsettle the minds of Her Majesty's subjects in the Dominion, and to disturb in an inconvenient manner the legislative and other proceedings there, if they were to grant the prayer of this petition, and so throw a doubt on the validity of the decision of the Court of Appeal below, than if they were to advise Her Majesty to refuse it.

Under these circumstances their Lordships feel it their duty humbly to advise Her Majesty that this leave to appeal should not be granted, and that the petition should be dismissed.

Solicitors for Petitioner: *Flux, Slade, & Co.*

CUSHING *v.* DUPUY, 5 APP. CAS. 409.

CHARLES CUSHING . . . . . CLAIMANT;

AND

LOUIS DUPUY . . . . . CONTESTANT.

J. C.* 1880 *Feb.* 24, 25; *April* 15.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR QUEBEC, CANADA.

Prerogative of the Crown to admit Appeals—Powers of Dominion and Provincial Legislatures—British North America Act, 1867, *ss.* 91, 92—*Canadian Act*, 40

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. 1880

CUSHING v. DUPUY.

Vict. c. 41, *s.* 28—"*Final*"—*Whether Delivery necessary to pass Property*—*Civil Code, Art.* 1472.

The *British North America Act*, 1867, s. 91, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer and did confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as these latter might be affected by a general law relating to those subjects. Consequently the Dominion enactment 40 Vict. c. 41, s. 28, amending the *Canadian Insolvent Act*, and providing that the judgment of the Court of Appeal in matters of insolvency should be final, *i.e.* not subject to the appeal as of right to Her Majesty in Council allowed by the *Civil Procedure Code*, art. 1178, is within the competence of the Canadian Parliament, and does not infringe the exclusive powers given to the Provincial Legislatures by sect. 92 of the Imperial statute. Neither does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code.

The section, according to the true construction of the word "final" therein, excludes appeals to Her Majesty; but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown; and, *quære*, what powers may be possessed by the Parliament of *Canada* so to do.

Cuvillier v. *Aylwin* (1) reviewed.

Assuming the Canadian law to be (notwithstanding arts. 1472, 1025, and 1027 of the *Canadian Civil Code*) that the property in a thing sold passes by a genuine contract of sale without delivery even as against third persons, *held*, on the evidence in this case, that the *indicia* of a *bonâ fide* sale were wanting, and that the circumstance of there having been no change of possession of the thing alleged to have been sold was one of the material facts to shew that the sale was simulated.

5 *App. Cas. p.* 410.

Appeal from a judgment of the Court of Queen's Bench (March 22, 1878), whereby a judgment of the Superior Court (Oct. 5, 1877) was reversed.

The question raised in the proceedings was whether, under the laws relating to bankruptcy and insolvency in the province of *Quebec*, the Appellant was entitled as against the Respondent, the assignee of the estate of the insolvent firm of *McLeod, McNaughten, & Léveillé*, to certain plant, materials, furniture, and effects formerly belonging to the insolvents, and included within a notarial instrument or bill of sale, dated the 14th of March, 1877, and another deed of the same date, the provisions of both of which are sufficiently set forth in their Lordships' judgment.

The judgment of the Superior Court declared the Appellant to be the proprietor of the articles and things specified in the said deeds, but refused his prayer for immediate possession.

The judgment of the Court of Queen's Bench dismissed the whole of the Appellant's petition with costs, on the grounds (1.) that

(1) 2 Knapp's P. C. 72, *ante*, p. 198.

the deed of sale of the 14th of March, 1877, was a fraud upon the creditors of the insolvent firm, and on that ground void as against the assignee of their estate. (2.) That the deed was in substance and reality not a sale but a pledge, and was void as a pledge by reason of the pledgee (the Appellant) never having taken possession of the articles pledged. (3.) That assuming the deed to be operative as a deed of sale, the title of the Respondent upon his taking possession of the property comprised therein had priority over that of the Appellant, who had never taken possession of the said property.

Thereupon the Appellant moved for leave to appeal to Her Majesty in her Privy Council, and it was ordered that a rule *nisi* be issued for that purpose. The rule was argued, and on the 22nd of June, 1878, was unanimously discharged by the Court, consisting of the same Judges as had heard the appeal, on the ground that by law judgments rendered on appeals to the Court of Queen's Bench in matters of insolvency are final, and that from such judgments no appeal lies to Her Majesty in her Privy Council.

On the 27th of November, 1878, by an order of Her Majesty in Council, the Appellant was allowed to enter and prosecute his appeal, without prejudice to the question of Her Majesty's jurisdiction to admit appeals in cases of insolvency from the Court of Queen's Bench.

5 *App. Cas.* p. 411.

Mr. *Kenelm Digby*, for the Respondent, as a preliminary objection to the appeal, contended that the jurisdiction of Her Majesty to entertain it had been taken away by Canadian Statute, 40 Vict. c. 41, s. 28, which amended the *Insolvent Act of* 1875 (38 Vict. c. 16), s. 128, by adding thereto the words, "the judgment of the Court to which under this section the appeal can be made shall be final." Such provision was within the competence of the Dominion Parliament, by virtue of its general legislative authority, and of the special powers relating to bankruptcy and insolvency conferred by *British North America Act,* 1867, s. 91. "Final" may mean (1), final in the Colony, *i.e.* prohibiting an appeal to the Supreme Court; or (2), that the prerogative of the Crown to grant an appeal is taken away; or (3), that the appeal as of right to the Crown is taken away. It was intended to render the judgment referred to final as far as the Legislature could make it final; and therefore the question resolves itself into one of the extent of the legislative authority, whether it could and had taken away the royal prerogative. The authorities cited were, *Cuvillier* v. *Aylwin* (1); *Modee Kaikhooscrow Hormusjee* v.

(1) 2 Knapp, P. C. 72, *ante*, p. 198.

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Cooverbhaee (1); *In re Louis Marois* (2); *Queen* v. *Eduljee Byramjee* (3); *Queen* v. *Stephenson* (4); *Théberge* v. *Laudry* (5); *Johnston* v. *Ministers of St. Andrew's* (6). Assuming that Her Majesty's jurisdiction is not taken away, no case has been made out for granting special leave. [SIR MONTAGUE E. SMITH:—But leave has been granted, and the case is here, and, unless the jurisdiction has been taken away, had better proceed.]

5 *App. Cas. p.* 412.

Mr. *Davidson* (of the Canadian Bar) for the Appellant, contended that the appeal lay as of right to the Crown under art. 1178. Such appeal cannot be taken away by a Dominion enactment; if it could be interfered with at all by Canadian authority it must be by the provincial legislature, which had the exclusive right of dealing with this matter, being one of civil procedure: see *British North America Act*, 1867, sect. 91, sub-sect. 27, and sect. 101. Reference was made to *Meer Reasat Hossein* v. *Hadjee Abdoollah* (7). The word "final" in sect. 28 of the *Dominion Act* (40 Vict. c. 41) does not necessarily mean more than that the judgment was final as regards the Canadian Courts. The power of appeal to the Privy Council is not expressly taken away; while as regards the prerogative of the Crown to grant the special leave which has already been accorded, the section does not purport to interfere therewith. It would require express and precise words to cut down the prerogative, even if the Parliament of *Canada* had power so to do.

Mr. *Digby* replied.

The case was then argued upon its merits, judgment upon the preliminary objection being reserved.

Mr. *Davidson*, for the Appellant, contended that the transaction of the 14th of March, 1877, was sufficient to transfer the property in the subject thereof, and to vest it in the Appellant as against the Respondent. The evidence shews that delivery of possession actually took place. Otherwise the title would nevertheless be complete, having regard to the alteration in the law effected by the *Civil Code:* see arts. 1025, 1027, and 1472, whereby in the case of a sale property passes by the contract without delivery. Reference was made to *Insolvency Act*, 1875, sect. 16, 130; *Canadian Civil Code*, art. 1970: *Toullier*, vol. iv. p. 56: *Carret* v. *Gilbert* (8).

Mr. *Kenelm Digby*, for the Respondent, contended that upon the

(1) 6 Moore, Ind. Ap. Ca. 448, 454, 455.
(2) 15 Moo. P. C. 189, *ante*, p. 202.
(3) 5 Moore, 276.
(4) 5 Moore, 296.
(5) 2 App. Cas. 102.
(6) 3 App. Cas. 159.
(7) Law Rep. 1 Ind. Ap. 72.
(8) Sirey, 1864, part ii. p. 183.

evidence no delivery of possession of the things comprised in the transaction took place. Under the Canadian Law prior to the Code such delivery was admittedly necessary to pass the title. No question arises as to whether or not the *Civil Code* has altered the law which required delivery in case of a sale in order to pass the title as against third parties, because the transaction was not a genuine sale at all: see *Pothier, Traité du Contrat de Vente*, Part I. sect. 18; Co. Litt. 205 a. It was an attempt to pledge the property comprised therein, and was inoperative without delivery: see art. 1970 of the *Civil Code*.

5 *App. Cas.* p. 413.

Mr. *Davidson* replied.

The judgment of their Lordships was delivered by

Sir Montague E. Smith :—

This appeal is from a judgment of the Court of Queen's Bench of the Province of *Quebec*, reversing the judgment of a Judge of the Superior Court, which had been given in the Appellant's favour, in certain proceedings in insolvency instituted under an Act of Parliament of the Dominion of *Canada*, intituled "*An Act respecting Insolvency*" (38 Vict. c. 16).

These proceedings were commenced by a petition of Mr. *Cushing*, the Appellant, to the Superior Court, praying that Mr. *Dupuy*, the official assignee of the estate of the insolvent firm of *McLeod*, *McNaughten*, and *Léréillé*, might be ordered to deliver up certain property seized by him, as such assignee, under a writ of attachment, on the ground that it had been sold to the Petitioner by the insolvents before their insolvency.

An application to the Court of Queen's Bench for leave to appeal to Her Majesty in Council was refused, on the ground that, under the *Insolvency Act*, its judgment was final. The Appellant then presented a petition to Her Majesty for special leave to appeal, which Her Majesty was advised by their Lordships to grant, reserving to the Respondent power to raise at the hearing the question of Her jurisdiction to entertain the appeal.

That question, which has been fully argued at the Bar, raises two points: first, whether the Court of Queen's Bench was right in holding that the appeal to Her Majesty in Council, given *de jure* by art. 1178 of the *Code of Civil Procedure*, from final judgments rendered on appeal by that Court, is taken away by the *Insolvency Act;* and, secondly, if that be so, whether the power of the Crown, by virtue of its prerogative, to admit the appeal is affected by that Act.

5 *App. Cas.* p. 414.

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The 128th section of the *Insolvency Act* enacts as follows:—

"In the Province of *Quebec* all decisions by a Judge in Chambers in matters of insolvency shall be considered as judgments of the Superior Court; and any final order or judgment rendered by such Judge or Court may be inscribed for revision, or may be appealed from by the parties aggrieved, in the same cases and in the same manner as they might inscribe for revision or appeal from a final judgment of the Superior Court in ordinary cases under the laws in force when such decision shall be rendered."

By the 28th section of a subsequent Act of the Parliament of *Canada* (40 Vict. c. 41), it is enacted that the 128th section of the former Act shall be amended by adding thereto the following words:—

"The judgment of the Court to which, under this section, the appeal can be made shall be final."

This Court, in the Province of *Quebec*, is the Court of Queen's Bench.

The whole question turns on these added words, and in considering their effect on the right of appeal to the Crown given *de jure* by the Code, two things are to be regarded—(1), the power of the Dominion Parliament to abrogate this right; and (2), if it had the power, whether it intended to exercise it.

The first of these questions depends upon the construction of the *British North America Act*, 1867, which confers and distributes legislative powers. By sect. 91 of that Act, exclusive legislative authority in certain matters is conferred upon the Parliament of *Canada*, and by sect. 92 exclusive authority in certain others upon the Provincial Legislatures.

Sect. 91 is as follows:—

"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of *Canada*, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and, for greater certainty, but not so as to restrict, the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament

5 *App. Cas.* *p.* 415.

of *Canada* extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

"21. Bankruptcy and Insolvency."

Sect. 92 enacts,—

"In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

"13. Property and civil rights.

"14. The administration of justice in the province, including the constitution, maintenance, and organisation of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

It was contended for the Appellant that the provisions of the *Insolvency Act* interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of *Canada* could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the Legislature of the Province.

The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realisation, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them. (1) Their Lordships therefore think that the Parliament of *Canada* would not infringe the exclusive powers given to the Provincial Legislatures, by enacting that the judgment of the Court of Queen's Bench in matters of insolvency should be final, and not subject to the appeal as of right to Her Majesty in Council allowed by art. 1178 of the *Code of Civil Procedure*.

5 *App. Cas.* p. 416.

(1) Ref. *Citizens Insurance Company* v. *Parsons*, *post*, p. 282; Appl. *Tennant* v. *Union Bank*, *post*, p. 445; Appr. *Ontario* v. *Dominion*, *post*, p. 491.

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Nor, in their Lordships' opinion, would such an enactment infringe the Queen's prerogative, since it only provides that the appeal to Her Majesty given by the Code framed under the authority of the Provincial Legislature, as part of the civil procedure of the province, shall not be applicable to judgments in the new proceedings in insolvency which the Dominion Act creates. Such a provision in no way trenches on the Royal prerogative.

Then it was contended that if the Parliament of *Canada* had the power, it did not intend to abolish the right of appeal to the Crown. It was said that the word "final" would be satisfied by holding that it prohibited an appeal to the Supreme Court of *Canada*, established by the Dominion Act of the 38 Vict. c. 11. Their Lordships think the effect of the word cannot be so confined. It is not reasonable to suppose that the Parliament of *Canada* intended to prohibit an appeal to the Supreme Court of Appeal recently established by its own legislation, and to allow the right of immediate appeal from the Court of Queen's Bench to the Queen to remain. Besides the word "final" has been before used in Colonial legislation as an apt word to exclude in certain cases appeals as of right to Her Majesty. (See the *Lower Canada* statute, 34 Geo. 3, c. 30.) Such an effect may, no doubt, be excluded by the context, but there is none in the enactment in question to limit the meaning of the word. For these reasons their Lordships think that the Judges below were right in holding that they had no power to grant leave to appeal.

The question of the power of the Queen to admit the appeal, as an act of grace, gives rise to different considerations. It is, in their Lordships' view, unnecessary to consider what powers may be possessed by the Parliament of *Canada* to interfere with the royal prerogative, since the 28th section of the *Insolvency Act* does not profess to touch it; and they think, upon the general principle that the rights of the Crown can only be taken away by express words, that the power of the Queen to allow this appeal is not affected by that enactment. In consequence, however, of the decision in *Cuvillier* v. *Aylwin* (1), which has been relied on as an authority opposed to this view, it becomes necessary to review that case in connection with the subsequent decisions on the subject.

5 *App. Cas.* p. 417.

The question in *Cuvillier* v. *Aylwin* (1) arose upon the *Lower Canada Colonial Act* (34 Geo. 3, c. 6), which enacted that the judgment of the Court of Appeal should be final in all cases under the value of £500, and an application for special leave to appeal in a case under that value was refused by a Committee of the Privy Council. The remarks attributed to the Master of the

(1) 2 Knapp's P. C. 72, *ante*, p. 198.

Rolls, in his judgment rejecting the petition, are directed to one aspect only of the question, viz., the power of the Crown with the other branches of the Legislature to deprive the subject of one of his rights. No allusion was made to the principle that express words are necessary to take away the prerogative rights of the Crown, nor to the provision contained in the statute itself, that nothing therein contained should derogate from any right or prerogative of the Crown. This case, moreover, if not expressly overruled, has not been followed, and later decisions are opposed to it.

In *Re Louis Marois* (1), upon an application for leave to appeal from a judgment of the Court of Queen's Bench for *Lower Canada*, Lord *Chelmsford*, in giving the judgment of this Committee, after stating that in *Cuvillier* v. *Aylwin* (2) the very point was decided against the Petitioner, said:—

"If the question is to be concluded by that decision, this petition must be at once dismissed; but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines, and he does not appear to have directly adverted to the effect of the proviso contained in the 43rd section of the Act on the prerogative of the Crown." 5 *App. Cas.* p. 418.

Leave to appeal was granted in that case, subject to the risk of a petition being presented to dismiss the appeal as incompetent. Although their Lordships, in granting this leave, said that they desired to intimate no opinion whether the decision in *Cuvillier* v. *Aylwin* (2) could be sustained or not, it is obvious that, at the least, they regarded it as being open to review.

In *Johnston* v. *The Minister and Trustees of St. Andrew's Church* (3), upon an application for special leave to appeal against a judgment of the Supreme Court of *Canada*, the effect of the 47th section of the Act establishing that Court, which enacted that its judgments should be final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative, came in question, and the Lord Chancellor, in giving the judgment of this Committee, said:—

"Their Lordships have no doubt whatever that assuming, as the petitioners do assume, that their power of appeal as a matter

(1) 15 Moo. P. C. 189, *ante*, p. 202. (2) 2 Knapp's P. C. 72, *ante*, p. 198.
(3) 3 App. Cas. 159.

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of right is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised, is left entirely untouched and preserved by this section."

Although leave to appeal was in this instance refused, on the ground that the case was not a proper one for the exercise of the prerogative, the opinion cited above is virtually opposed to the decision in *Cuvillier* v. *Aylwin* (1), where, it is to be remembered, the Act in question likewise contained a saving of the prerogative of the Crown.

Another case, lately before this Committee, requires consideration, *Théberge and Another* v. *Laudry* (2). It was an application for special leave to appeal against a judgment of the Superior Court of *Quebec* upon an election petition, by which the applicant had been unseated for corrupt practices. By the *Quebec Controverted Elections Act*, 1875, the decision of controverted elections, which formerly belonged to the Legislative Assembly itself, was conferred upon the Superior Court, and by sect. 90 of the Act it was enacted that the judgment of that Court sitting in review should not be susceptible of appeal. It was held by this Committee that there was no prerogative right in the Crown to review the judgment of the Superior Court upon an election petition, and the application was refused. This decision turned on the peculiar nature of the jurisdiction delegated to the Superior Court, and not merely on the prohibitory words of the statute. It was distinctly and carefully rested on the ground of the peculiarity of the subject-matter, which concerned not mere ordinary civil rights, but rights and privileges always regarded as pertaining to the Legislative Assembly, in complete independence of the Crown, so far as they properly existed; and consequently it was held that, in transferring the decision of these rights from the Assembly to the Superior Court, it could not have been intended that the determination in the last resort should belong to the Queen in Council. But, whilst coming to this decision, the Lord Chancellor, in giving the judgment of the Committee, affirmed the general principle as to the prerogative of the Crown:—

5 *App. Cas.* *p.* 419.

"Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shewn to take away that prerogative."

(1) 2 Knapp's P. C. 72, *ante*, p. 198. (2) 2 App. Cas. 102.

It was not suggested that an appeal would not have lain to the Queen in Council under the *Insolvency Act* of 1875; and it was not until two years afterwards that the Amending Act of 1877, which is said to have taken it away, was passed.

The learned Counsel for the Appellant drew attention to the Act of the Parliament of *Canada* (31 Vict. c. 1), which enacts rules of interpretation to be applied to all future legislation, when not inconsistent with the intent of the Act or the context.

Sub-sect. 33 of sect. 7 of that Act is as follows:—

"No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs, or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby." 5 *App. Cas.* p. 420.

The Insolvent Acts are to be construed with reference to this provision, which is substantially an affirmance of the general principle of law already adverted to.

Applying that principle to the enactment in question, their Lordships are of opinion that, as it contains no words which purport to derogate from the prerogative of the Queen to allow, as an act of grace, appeals from the Court of Queen's Bench in matters of insolvency, her authority in that respect is unaffected by it.

The order for leave to appeal granted in the present case will consequently stand.

Upon the merits of the appeal the following are the principal facts:—Messrs. *McLeod, McNaughten, & Léréillé*, who carried on business as brewers in *Montreal*, became insolvent on the 19th of July, 1877, and on the same day their estate and effects including the plant, material, and effects, which are the subject of these proceedings, were seized by the Respondent, as official assignee under a writ of attachment in insolvency. Thereupon the Appellant, who is a notary, demanded from the assignee the delivery of the above-mentioned plant and effects, on the ground that they had been sold to him by the insolvents on the 14th of March, 1877, about four months before the insolvency. He claims them as owner under a contract of sale, in the petition which gives rise to this appeal.

The contract on which the Appellant relies is contained in a notarial instrument, by which the insolvents purport to bargain, sell, and assign to the Appellant the plant, material, furniture, and effects (described in detail in the bill of sale), lying and being in and about

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their brewery. Some of these effects are valued in the bill of sale, the total of these values amounting to $4800; others are not valued. The consideration is thus stated in the deed:—

"The present bargain and sale is made in manner aforesaid, for and in consideration of the sum of one dollar currency, cash in hand, paid at the execution hereof, and for other good and valuable consideration heretofore had and received, the receipt whereof is hereby acknowledged, whereof quit, and in further consideration that the said purchaser shall indorse the paper of the firm of *McLeod, McNaughten, & Lévéillé*, which he agrees to do on demand, for a sum which, together with present unsecured indorsements, shall not exceed in all two thousand dollars."

Authority is given to the Appellant by the deed to take possession of the effects.

On the same day a lease was made by the Appellant to the insolvents of the same plant and effects for three years at a yearly rent of $100.

The petition of the Appellant alleges that he took possession of the effects, but in fact no removal or change of possession whatever took place, and the plant and effects remained in the possession of the insolvents, precisely as before, up to the time of their insolvency. All that the Petitioner in his evidence states with regard to possession is, that he went over the effects, and verified their existence.

The general question was raised, and much discussed in the Courts below, whether delivery or *déplacement* of the thing sold was necessary to pass the property in it. It was contended that the Canadian law which required *déplacement* had been altered in this respect by the *Canadian Civil Code*, as the French law had been by the *Code Napoléon*.

Article 1472 of the *Canadian Code* is as follows:—

"Sale is a contract by which one party gives a thing to another for a price in money, which the latter obliges himself to pay for it. It is perfected by the consent alone of the parties, although the thing sold be not then delivered, subject, nevertheless, to the provisions contained in Article 1027."

Article 1025 was also referred to.

Article 1027 is as follows:—

"The rules contained in the two last preceding articles apply

as well to third persons as to the contracting parties, subject, in contracts for the transfer of immoveable property, to the special conditions contained in the Code for the registration of titles to and claims upon such property. But if a party oblige himself successively to two persons to deliver to each of them a thing which is purely moveable property, that one of the two who has been put in actual possession is preferred, and remains owner of the things, although his title be posterior in date; provided, however, that his possession be in good faith."

5 *App. Cas.* p. 422.

The question was debated in the Courts below whether, under the law established by these articles, *déplacement* or a change of possession was not still necessary to give the petitioner a title against the assignee in insolvency. Their Lordships, however, do not feel it necessary to determine this question, because, allowing the Appellant's construction of these articles to the fullest extent, and assuming for the purpose of the present decision that, upon a genuine contract of sale, the property sold would pass to the vendee, as regards not only the vendor, but third persons, without delivery or *déplacement*, they agree with the opinion of Chief Justice *Dorion* (in which Justices *Cross* and *Tessier* concurred) that the transaction in question was not a genuine but a simulated sale, and, if at all real, was a contrivance intended to obtain, under colour of a sale, a security upon the plant and effects, and thus to avoid the delivery of possession which is essential to the validity of a pledge. (See as to pledge, arts. 1966–1970, *Canadian Civil Code.*)

In examining the character of the transaction, it is in the first place to be observed that the alleged sale was not for a price in money, nor for anything equivalent to money; nor was the consideration fixed and certain, but wholly indeterminate, the amount depending on future contingencies. The considerations expressed in the instrument are, (1) one dollar, which of course is merely a nominal, and not a serious part of the consideration; (2) "other good and valuable consideration heretofore had and received," the nature and amount being both unexpressed; and (3) what appears to be the real consideration, viz., that the vendee should indorse the paper of the firm, which he agreed to do on demand, for a sum which, together with present unsecured indorsements, should not exceed in all $2000. This agreement of the Appellant to give his indorsements by way of accommodation to the firm is obviously a consideration of an indeterminate character. Suppose he refused to give them, the remedy would be an action for breach of the agreement, in which the damages would be uncertain.

5 *App. Cas.* p. 423.

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Again, he does not bind himself to pay the bills he may indorse, and the holders might in the first instance choose to sue the firm. The ultimate extent of the liability on the agreement to indorse is plainly uncertain. This vague and contingent liability contains none of the elements of a fixed price, which is one of the essential incidents of the contract of sale. (See *Pothier, Traité du Contrat du Vente*, Part I., sec. 2, art. 2, secs. 1, 2, 3.)

But, however inconsistent the consideration expressed in the bill of sale may be with the idea of a sale, it would be fit and sufficient to support a contract of pledge for securing the Appellant against loss arising from his indorsements of the paper of the firm; and that this, if it were at all real, was the nature and object of the transaction, is shewn by other circumstances attending it. The value of some of the effects (for what reason does not appear) is stated in the deed, and this value alone amounts to $4800. The rest is not valued, but obviously must have been of substantial value. It is scarcely to be supposed that all these effects would have been absolutely sold to the Appellant for a contingent consideration which could not exceed $2000.

Then, on the same day, the whole of the effects are leased to the insolvents for a yearly rent of $100. As the Chief Justice points out, this rent would return the supposed owner of the plant and stock $1\frac{1}{2}$ or $2\frac{1}{2}$ per cent. only upon their value, whilst these implements would come back to him at the end of the term deteriorated by wear and tear. Such a rent he considers to be illusory. Under colour of this lease the insolvents were able to retain the plant and carry on their business as usual.

It is to be observed that a transaction which presents on the face of the documents so anomalous a character has received no extraneous support or explanation. The Appellant gave no evidence of any antecedent consideration, or of the extent of his indorsements of the paper of the firm, or of any circumstances to explain the alleged purchase.

5 *App. Cas.* p. 424.

It is scarcely necessary for their Lordships to say that, supposing (as they have assumed) the law to be that the property in the thing sold passes by a genuine contract of sale without delivery, even as against third persons, yet the circumstance of there being no change of possession must still be one of the material facts to be regarded in determining the question whether any particular sale is real or simulated.

In the present case their Lordships, for the reasons they have stated, agree with the majority of the Judges of the Court of Queen's Bench in their conclusion that, whatever may be the real

nature of the transaction in question, it has not the *indicia* of a *bonâ fide* sale.

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They will, therefore, humbly advise Her Majesty to affirm the judgment appealed from, and with costs.

Solicitors for Appellant: *Simpson, Hammond, & Co.*
Solicitors for Respondents: *Freeman & Bothamley.*

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THE CITIZENS INSURANCE COMPANY OF CANADA . . . . . } DEFENDANT;

AND

WILLIAM PARSONS . . . . . PLAINTIFF.

AND

THE QUEEN INSURANCE COMPANY . . DEFENDANT;

AND

WILLIAM PARSONS . . . . . PLAINTIFF.

[ON APPEAL FROM THE SUPREME COURT OF CANADA.]

British North America Act, 1867, *ss.* 91, 92—*Distribution of Legislative Power*—"*Property and civil rights*"—"*Regulation of trade and commerce*"—*Validity of* (*Ontario*) *Act* 39 *Vict. c.* 24—*Construction—Statutory Conditions of Policies of Insurance—Interim Notes.*

Sects. 91 and 92 of the British North America Act, 1867, must, in regard to the classes of subjects generally described in sect. 91, be read together, and the language of one interpreted and, where necessary, modified by that of the other, so as to reconcile the respective powers they contain and give effect to all of them. Each question should be decided as best it can, without entering more largely than is necessary upon an interpretation of the statute.

Held, that;—

In No. 13 of sect. 92, the words "property and civil rights in the province" include rights arising from contract (which are not in express terms included under sect. 91) and are not limited to such rights only as flow from the law, e.g., the status of persons.

In No. 2 of sect. 91, the words "regulation of trade and commerce" include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and, it may be, general regulation of trade affecting the whole dominion; but do not include the regulation of the contracts of a particular business or trade

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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such as the business of fire insurance in a single province, and therefore do not conflict with the power of property and civil rights conferred by sect. 92, No. 13.

Consequently ;—

(Ontario) Act 39 Vict. c. 24, which deals with policies of insurance entered into or in force in the Province of Ontario for insuring property situate therein against fire, and prescribes certain conditions which are to form part of such contracts, is a valid Act; applicable to the contracts of all such insurers in Ontario, including corporations and companies, whatever may be their origin, whether incorporated by British authority or by foreign or colonial authority.

Held, further, that the said Ontario Act is not inconsistent with Dominion Act 38 Vict. c. 20, which requires all insurance companies whether incorporated by foreign dominion or provincial authority to obtain a license, to be granted only upon compliance with the conditions prescribed by the Act.

Held, further, that according to the true construction of the Ontario Act, whatever may be the conditions sought to be imposed by insurance companies, no such conditions shall avail against the statutory conditions, and the latter shall alone be deemed to be part of the policy and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the manner prescribed by the Act. The penalty for not observing that manner is that the policy becomes subject to the statutory conditions, whether printed or not. Where a company has printed its own conditions and failed to print the statutory ones it is not the case that the policy must be deemed to be without any conditions at all.

An interim note being merely an agreement for interim insurance preliminary to the grant of a policy is not a policy within the meaning of that term in the Ontario Act. "Subject to all the usual terms and conditions of this company" in such note means that such conditions ought to be read into the interim contract to the extent to which they may lawfully be made a part of the policy when issued by following the directions of the statute, subject always to the statutable condition that they should be held to be just and reasonable by the Court or judge.

Appeals from two judgments of the Supreme Court (June 21, 1880).

In the first case the action was brought on the 18th of March, 1878, for the sum secured by a certain policy of insurance.

The defence was non-disclosure by the respondent of a previous insurance which was alleged to be (a) a breach of the conditions indorsed on the policy; (b), in the alternative, a breach of the statutory conditions prescribed by Ontario Act 39 Vict. c. 24.

The respondent replied that the policy was not subject to the conditions indorsed upon it because they were not printed as variations from the statutory conditions in the manner prescribed by the statute; nor to the statutory conditions, because they did not appear on the policy.

The judge ruled in favour of the respondent's contention, and a verdict was entered for him for $2575, but the judge reserved all questions of law for the Court.

On the 23rd of May, 1878, the company obtained a rule nisi in the Court of Queen's Bench for the province of Ontario to enter a nonsuit pursuant to leave reserved, or for a new trial, on the ground that the verdict was contrary to law and evidence.

On the 29th of June, 1878, the rule nisi was discharged, the Court holding that insurance companies incorporated by the dominion parliament are, as regards insurances effected by them in the province of Ontario, bound by the provincial statute 39 Vict. c. 24, and subject to all the consequences of non-compliance with its provisions; and, further, that a policy of insurance issued after the passing of the Act, but not in compliance with its provisions, was to be deemed as against the assured as a policy without any conditions.

On appeal by the company, the Court of Appeal for the province, on the 10th of March, 1879, affirmed the judgment of the Court of Queen's Bench. A further appeal was dismissed by a majority of the judges of the Supreme Court of Canada, on the 28th of June, 1880.

In the second case, the action was brought on the same date (18th of March, 1878), on an interim receipt to recover the amount of the insurance thereby effected.

The defence was, non-disclosure by the respondent of previous insurances; that more than 10 lbs. of gunpowder had been deposited in the insured premises after the issuing of the receipt and contrary to the terms thereof; that no notice of loss in writing had been given; that more than 25 lbs. of gunpowder were on the premises at the time of the fire.

The respondent joined issue on the pleas of the appellant. It was not denied that the usual terms and conditions indorsed on the appellant's policies had not been complied with, but it was contended by the respondent that the Ontario statute rendered void those terms and conditions as not having been indorsed in the form required by the statute as variations in the statutory conditions; and it was further contended by the respondent that the statutory conditions did not apply in that they were not indorsed on the interim note, as required by the said statute, and the judge was prepared so to rule upon the authority of two cases previously decided by the Courts of Ontario, but he said that as the only one of the statutory conditions upon which reliance could be placed by the appellant was the condition that the sum insured should not be recovered if more than 25 lbs. of gunpowder were on the premises at the time of the fire, he should leave the question to the jury whether there were 25 lbs. of gunpowder on the premises at the time of the fire or not. 7 *App. Cas.* p. 99.

The jury found that there were not 25 lbs. of gunpowder on the premises at the time of the fire, and a verdict was therefore entered

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for the respondent for the sum of $2070, but the judge reserved leave for the appellant to enter a nonsuit if the said usual terms and conditions were binding on the respondent.

On the 23rd of May, 1878, the appellant obtained a rule nisi in the Court of Queen's Bench of the province of Ontario to enter a nonsuit pursuant to the leave reserved at the trial, and to set aside the verdict at the trial for misdirection of the Judge, (1) there being further insurances on the property insured; (2) a greater quantity of gunpowder contained in the premises containing the insured goods than permitted by and contrary to the terms of the Appellant's contract with the Respondent; and (3) the proofs of loss required by the contract not having been furnished in due time; which misdirection consisted in telling the jury there was no question for them except the quantity of gunpowder on the premises.

The Court of Queen's Bench discharged the rule and held—

(1.) That the Act imposing the statutory conditions applied to the case of an interim receipt, as well as to actual policies, and that the requirements of the statute not having been complied with, the contract contained in the interim receipt was subject (*a*) either to the statutory conditions, (*b*) or to no conditions except such as might be implied by law.

(2.) That there was no evidence of prior insurances not properly disclosed.

(3.) That the respondent was entitled to retain the verdict.

The Court of Appeal of Ontario, on the 22nd of March, 1879, dismissed an appeal from the said judgment, and a majority of the Judges of the Supreme Court of Canada dismissed a further appeal which was instituted against the judgment of the 22nd of March.

7 *App. Cas.* p. 100.

The Solicitor-General (*Sir F. Herschell*, Q.C.), and *Benjamin*, Q.C. (*Jeune* with them), for the appellant in the first case, contended that according to the conditions appearing on the policy, and assented to by the respondent, he was not entitled to be paid the compensation which he claimed thereunder. As regards Ontario Statute, 39 Vict. c. 24, it was contended, first, that it was void as being ultrà vires the provincial legislature; second, that if valid and applicable so as to disentitle the company to rely on the conditions which appeared on the policy, still the omissions complained of with regard to previous insurance were not merely a breach of the said conditions, but also of the conditions imposed by the statute and imported thereby into the policy, whether printed thereon or not.

As regards the validity of the Act, it was contended that according to the true construction of the British North America Act, 1867, such an enactment was within the exclusive competence of the dominion

parliament, and beyond that of the Ontario Legislature. Reference was made especially to sect. 91, No. 2, and sect. 92, No. 13. In the former "regulation of trade and commerce" means within the whole dominion. They are the most general words which can be used, and include every kind of business which can possibly be carried on. Reference was made to the Civil Code of Lower Canada, art. 2470. [SIR A. HOBHOUSE referred to sect. 92, No. 10, as shewing that at all events some subjects of trade and commerce can be regulated by the provincial parliament.] But in this case the Ontario statute purports to regulate the whole conduct of insurance business within the province, notwithstanding that in the one case the company was incorporated by the dominion, and in the other by the imperial parliament, in the one case the proposal to insure was made in Ontario, and accepted in Montreal, in the other, the contract on the interim note was complete in Ontario. Further the Dominion Act, 38 Vict. c. 20, has imposed certain conditions upon companies of this kind upon the performance of which the right to carry on business results, which cannot afterwards be hampered or restricted, however locally, by a provincial legislature. The scheme of the British North America Act is that the dominion parliament has all legislative power except that which is exclusively given to the provincial legislatures. The true mode of construction is to see if the subject is exclusively given to the provincial parliament, if not it belongs to the dominion parliament. The true meaning of sect. 92, No. 13, is that the provincial parliament has the exclusive right to create within the province rights of property and such civil rights as flow from the operation of law; which it can exercise without infringing the dominion control over contracts and the rights resulting therefrom. The circumstances under which the Imperial Act was passed and its object should be taken into consideration in construing it. Sects. 3, 4, 5, and 6 are important. Two provinces of Ontario and Quebec were created, because the latter is a French colony governed by French civil law. Rights of property and civil rights are there governed differently from the other provinces. Sect. 94 omits Quebec from the uniformity of legislative concurrent power; compare sects. 93 and 95. That throws light on the meaning of the expression in sect. 92, No. 13; which is to be construed in its narrower sense, and not so as to affect or cut down the exclusive control over trade, commerce, and contracts given to the dominion parliament. Contract, moreover, is not included in that chapter of the Civil Code which deals with civil rights. Though a single contract of indemnity may not be trade and commerce, yet if an insurance company is formed whose business it is to make such contracts, its transactions

7 *App. Cas.* p. 101.

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fall within the description of trade and commerce, that is of carrying on business for a profit, which is all that is meant by trade. One of the companies in these cases is sued as a company under the Dominion Act, see 39 Vict. c. 55, and 27 and 28 Vict. c. 98. The dominion power, therefore, to incorporate a company is admitted, but it is contended upon the other side that the power to prescribe its mode of carrying on business must be split between the two legislatures in a way which is irreconcilable with the word "exclusive," as used in the Imperial Act.

With regard to the second case the terms of the special contract under the interim receipt must be attended to, into which conditions similar to those appearing on the policy were imported by reference and assented to by the respondent, and were therefore binding for similar reasons.

7 *App. Cas.* p. 102.

Sir John Holker, Q.C., and *A. L. Smith*, for the respondent, contended that the provincial legislature had power to enact the statute 39 Vict. c. 24, and that its requirements had not been complied with. With regard to the validity of the Act, the real question is whether insurance is trade and commerce within the meaning of sect. 91, No. 2 of the Act of 1867. If the other side can establish their definition of trade as that of carrying on business for a profit there is nothing more to be said. But they gave no authority for that definition, which rests only upon imagination. Agriculture, schoolmastering, the business of a solicitor, are all businesses carried on for profit, yet these are not trades. The insurer contracts for a consideration, but he neither buys nor sells. He is not connected with trade or commerce in any way. He does not sell indemnities. To buy and sell merchandise is the notion of a trader which pervades the Bankruptcy Acts. Reference was made to *In re Griffith, Carr* v. *Griffith* (1); *Lawless* v. *Sullivan* (2). Insurance is not a trade. The regulation of trade and commerce has been well defined by Mr. Justice Henry in this case as including the operations of manufacturers, the hiring of their operatives, the providing and erection of machinery, procuring the raw materials used by them, with the necessary contracts and agreements and expenditure of labour employed, and the interests of all parties engaged, from the owner of the soil through all the train of persons engaged, in producing and supplying timber, iron, or other materials, for manufacturing purposes. A fire insurance company may operate in respect of agricultural buildings, but that affects in a very remote way the trade and commerce of the country. Sect. 91, No. 2, should be construed as applying to all regulations of trade and commerce which do not affect civil rights. But the local legislatures are empowered to deal with all

(1) Law Rep. 12 Ch. D. 655. (2) 6 App. Cas. 382.

questions of a local character, and the mode in which persons carry on their business within the limits of the province is a question of a local character. If a railway began and ended within a particular province, there is no reason why provincial legislation should not regulate it. The provinces are virtually separate countries federated into one, as in the case of the United States. Each member of the confederation is a separate state, and has the right to make its own laws, subject to those which apply to the whole confederation. If the provincial legislature can incorporate companies for provincial objects, regulate provincial agriculture, deal with public-houses in the province, there would seem to be no reason why it should not prescribe the mode of carrying on the business of fire insurance within the province. The expression "civil rights" in sect. 92, No. 13, cannot be restricted as contended for on the other side. It is not so restricted in the Civil Code of Lower Canada, in which under that head a number of provisions relating to contract are to be found. See also the expression as used in 14 Geo. 3, c. 83. As to the power of the dominion parliament indirectly by its regulations of trade to affect such rights as it is contended are assigned to provincial legislative competence, see *Cushing* v. *Dupuy* (1); *L'Union St. Jacques de Montréal* v. *Bélisle* (2).

7 *App. Cas.* p. 103.

The Ontario Act being valid and operative it follows that both the policy and the interim note could be treated by the respondent as free from conditions, and that the respondent having in each case proved the contract and loss, is entitled to recover. The interim receipt was a policy within the meaning of the local Act. In neither case had the requirements of that Act been complied with. The statutory conditions were not printed, nor were the variations therein made as required. If the policy was not freed from conditions altogether, the respondent was only bound by the conditions thereon, which related to the case of a subsequent insurance, and not to an insurance existing at the time of making the policy. As to the interim note, that must be treated as subject only to the statutory conditions, none of which had been infringed; otherwise it was not proved that any of the usual terms or conditions of the company, even if imported by reference into the contract, had been infringed by the respondent.

The Solicitor-General replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE SMITH:—

The questions in these appeals arise in two actions brought by the same plaintiff (the respondent) upon contracts of insurance against

7 *App. Cas.* p. 104.

(1) 5 App. Cas. 409, *ante*, p. 253. (2) Law Rep. 6 P. C. 31, *ante*, p. 206.

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fire of buildings situate in the province of Ontario, in the dominion of Canada.

The most important question in both appeals is one of those, already numerous, which have arisen upon the provisions of the British North America Act, 1867, relating to the distribution of legislative powers between the parliament of Canada and the legislatures of the provinces, and, owing to the very general language in which some of these powers are described, the question is one of considerable difficulty. Their Lordships propose to deal with it before approaching the facts on which the particular questions in the actions depend. It will only be necessary to premise that "The Citizens Insurance Company of Canada," the defendant in the first action, was originally incorporated by an Act of the late province of Canada, 19 & 20 Vict. c. 124, by the name of "The Canada Marine Insurance Company." By another Act of the late province, 27 & 28 Vict. c. 98, further powers, including the power of effecting contracts of insurance against fire, were conferred on the company, and its name changed to "The Citizens Insurance and Investment Company;" and, finally, by an Act of the dominion parliament, its name was again changed to the present title, and it was enacted that, by its new name, it should enjoy all the franchises, privileges, and rights, and be subject to all the liabilities of the company under its former name.

The Queen Insurance Company is an English fire and life insurance company incorporated under the provisions of the Joint Stock Companies Act of the imperial parliament, 7 & 8 Vict. c. 110. It has its principal office in England, and carries on business in Canada.

The defendant company in each of the actions is the Appellant.

The statute impeached by the appellants, as being an excess of legislative power, is an Act of the legislature of the province of Ontario (39 Vict. c. 24), intituled "An Act to secure uniform Conditions in Policies of Fire Insurance."

The preamble of the Act is as follows:—

"Whereas under the provisions of an Act passed in the 38th year of the reign of Her Majesty, intituled 'An Act to amend the Laws relating to Fire Insurances,' the Lieutenant-Governor issued a commission to certain commissioners therein named, requiring them to consider and report what conditions are just and reasonable conditions to be inserted in fire insurance policies on real or personal property in this province: And whereas a majority of the said commissioners have, in pursuance of the requirements of the said Act, settled and approved of the conditions set forth in the schedule to this Act; and

7 App. Cas. p. 105.

it is advisable that the same should be expressly adopted by the legislature as the statutory conditions to be contained in policies of fire insurance entered into or in force in this province:

It enacts as follows:—

1. "The conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be part of every policy of fire insurance hereafter entered into, or renewed, or otherwise in force in Ontario, with respect to any property therein, and shall be printed on every such policy with the heading 'Statutory Conditions,' and if a company (or other insurer) desire to vary the said conditions, or to omit any of them or to add new conditions, there shall be added in conspicuous type, and in ink of different colour, words to the following effect:—

Variations in Conditions.

"'This policy is issued on the above statutory conditions, with the following variations and additions:—

"'These variations (*or as the case may be*) are, by virtue of the Ontario statute in that behalf, in force so far as, by the Court or judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company.'

"2. Unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, no such variation, addition, or omission shall be legal and binding on the insured; and no question shall be considered as to whether any such variation, addition, or omission is, under the circumstances, just and reasonable, and on the contrary the policy shall, as against the insurers, be subject to the statutory conditions only, unless the variations, additions, or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid.

"3. A decision of a Court or judge under this Act shall be subject to review or appeal to the same extent as a decision by such Court or judge in other cases." 7 *App. Cas.* p. 106.

The schedule contains twenty-one conditions under the head "Statutory Conditions." The following of them are material to the particular questions to be decided in the appeals:—

"After application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company shall, in writing, point out the particulars wherein the policy differs from the application."

"8. The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears therein, or is indorsed thereon, nor if any subsequent in-

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surance is effected in any other company, unless and until the company assent thereto by writing, signed by a duly authorized agent."

"In the event of any other insurance on the property therein described having been assented to as aforesaid, then this company shall, if such other insurance remain in force, on the happening of any loss or damage, only be liable for the payment of a rateable proportion of such loss or damage without reference to the dates of the different policies."

"10. The company is not liable for the losses following, that is to say, among others:—

"(*g*) The company is not liable for loss or damage occurring while petroleum," and various other enumerated substances, "or more than twenty-five pounds' weight of gunpowder, are stored or kept in the building insured, or containing the property insured, unless permission is given in writing by the company."

The distribution of legislative powers is provided for by sects. 91 to 95 of "the British North America Act, 1867;" the most important of these being sect. 91, headed "Powers of the Parliament," and sect. 92, headed "Exclusive Powers of Provincial Legislatures."

7 *App. Cas.* *p.* 107.

Sect. 91 is as follows:—

"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that it is say,—"

Then follows an enumeration of twenty-nine classes of subjects.

The section concludes as follows:—

"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

Sect. 92 is as follows:—

"In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—"

Then follows an enumeration of sixteen classes of subjects.

The scheme of this legislation, as expressed in the first branch of sect. 91, is to give to the dominion parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature. If the 91st section had stopped here, and if the classes of subjects enumerated in sect. 92 had been altogether distinct and different from those in sect. 91, no conflict of legislative authority could have arisen. The provincial legislatures would have had exclusive legislative power over the sixteen classes of subjects assigned to them, and the dominion parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in sect. 91 (1); hence an endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section, "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section" that (notwithstanding anything in the Act) the exclusive legislative authority of the parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of sect. 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of sect. 92 (2).

7 *App. Cas.* p. 108.

Notwithstanding this endeavour to give pre-eminence to the dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the dominion parliament. Take as one instance the subject "marriage and divorce," contained in the enumeration of subjects in sect. 91; it is evident that solemnization of marriage would come within this general description; yet "solemnization of marriage in the province" is enumerated among the classes of subjects in sect. 92, and no one can doubt, notwithstanding the general language of sect. 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So "the raising of money by any mode or system of taxation" is enumerated among the classes of subjects in sect. 91;

(1) Adh. *Hodge* v. *The Queen*, *post*, p. 344.
(2) Disappr. *Ontario* v. *Canada*, *post*, p. 490.

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but, though the description is sufficiently large and general to include "direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by sect. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one (1). With regard to certain classes of subjects, therefore, generally described in sect. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them (2). In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand (3).

The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in sect. 92, and assigned exclusively to the legislatures of the provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature primâ facie falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the provincial legislature is or is not thereby overborne (4).

The main contention on the part of the respondent was that the Ontario Act in question had relation to matters coming within the class of subjects described in No. 13 of sect. 72, viz., "Property and civil rights in the province." The Act deals with policies of insurance

(1) Adh. *Bank of Toronto* v. *Lambe, post,* pp. 386, 387.

(2) Fol. *Dobie* v. *Temporalities Board, post,* p. 303. Appl. *Russell* v. *The Queen, post,* p. 319.

(3) Appr. *Hodge* v. *The Queen, post,* p. 342. *Manitoba* v. *Licence Holders Association, post,* p. 577.

(4) Appr. *Russell* v. *The Queen, post,* p. 316.

entered into or in force in the province of Ontario for insuring property situate therein against fire, and prescribes certain conditions which are to form part of such contracts. These contracts, and the rights arising from them, it was argued, came legitimately within the class of subject, "Property and civil rights." The appellants, on the other hand, contended that civil rights meant only such rights as flowed from the law, and gave as an instance the status of persons. Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words "civil rights." The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in express terms in any of the enumerated classes of subjects in sect. 91.

7 *App. Cas.* p. 110.

It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sects. 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited. In looking at sect. 91, it will be found not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned and enumerated, viz., "18, bills of exchange and promissory notes," which it would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the dominion parliament.

The provision found in sect. 94 of the British North America Act, which is one of the sections relating to the distribution of legislative powers, was referred to by the learned counsel on both sides as throwing light upon the sense in which the words "property and civil rights" are used. By that section the parliament of Canada is empowered to make provision for the uniformity of any laws relative to "property and civil rights" in Ontario, Nova Scotia, and New Brunswick, and to the procedure of the Courts in these three provinces, if the provincial legislatures choose to adopt the provision so made. The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces. The words "property and civil rights" are, obviously, used in the same sense in this section as in No. 13 of sect. 92, and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity. If, however, the narrow construction of

7 *App. Cas.* p. 111.

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the words "civil rights," contended for by the appellants were to prevail, the dominion parliament could, under its general power, legislate in regard to contracts in all and each of the provinces and as a consequence of this the province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the dominion legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwitstanding that Quebec has been carefully left out of the uniformity section of the Act.

It is to be observed that the same words, "civil rights," are employed in the Act of 14 Geo. 3, c. 83, which made provision for the Government of the province of Quebec. Sect. 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

The next question for consideration is whether, assuming the Ontario Act to relate to the subject of property and civil rights, its enactments and provisions come within any of the classes of subjects enumerated in sect. 91. The only one which the Appellants suggested as expressly including the subject of the Ontario Act is No. 2, "the regulation of trade and commerce."

A question was raised which led to much discussion in the Courts below and this bar, viz., whether the business of insuring buildings against fire was a trade. This business, when carried on for the sake of profit, may, no doubt, in some sense of the word, be called a trade. But contracts of indemnity made by insurers can scarcely be considered trading contracts, nor were insurers who made them held to be "traders" under the English bankruptcy laws; they have been made subject to those laws by special description. Whether the business of fire insurance properly falls within the description of a "trade" must, in their Lordships' view, depend upon the sense in which that word is used in the particular statute to be construed; but in the present case their Lordships do not find it necessary to rest their decision on the narrow ground that the business of insurance is not a trade.

7 App. Cas. p. 112.

The words "regulation of trade and commerce," in their unlimited sense are sufficiently wide, if uncontrolled by the context and other

parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shews that the words were not used in this unlimited sense. In the first place the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature, when conferring this power on the dominion parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.

"Regulation of trade and commerce" may have been used in some such sense as the words "regulations of trade" in the Act of Union between England and Scotland (6 Anne, c. 11), and as these words have been used in Acts of State relating to trade and commerce. Article V. of the Act of Union enacted that all the subjects of the United Kingdom should have "full freedom and intercourse of trade and navigation" to and from all places in the United Kingdom and the Colonies; and Article VI. enacted that all parts of the United Kingdom from and after the Union should be under the *same* "prohibitions, restrictions, and *regulations of trade*." Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the Articles of Union. Thus the Acts for regulating the sale of intoxicating liquors notoriously vary in the two kingdoms. So with regard to Acts relating to bankruptcy, and various other matters.

7 *App. Cas.* p. 113.

Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance

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in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sect. 92 (1).

Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the dominion parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects; questions of this kind, it may be observed, arose and were treated of by this Board in the cases of *L'Union St. Jacques de Montréal* v. *Bélisle* (2); *Cushing* v. *Dupuy* (3).

It was contended, in the case of the Citizens Insurance Company of Canada, that the company having been originally incorporated by the parliament of the late province of Canada, and having had its incorporation and corporate rights confirmed by the dominion parliament, could not be affected by an Act of the Ontario legislature. But the latter Act does not assume to interfere with the constitution or status of corporations. It deals with all insurers alike, including corporations and companies, whatever may be their origin, whether incorporated by British authority, as in the case of the Queen Insurance Company, or by foreign or colonial authority, and without touching their status, requires that if they choose to make contracts of insurance in Ontario, relating to property in that province, such contracts shall be subject to certain conditions.

7 *App. Cas. p.* 114.

It was further urged that the Ontario Act was repugnant to the Act of the late province of Canada, which empowered the company to make contracts for assurance against fire "upon such conditions as might be bargained for and agreed upon between the company and the assured." But this is, in substance, no more than an expanded description of the business the company was empowered to transact, viz., to make contracts of assurance against fire, and can scarcely be regarded as inconsistent with the specific legislation regarding such contracts contained in the Act in question.

It was further argued on the part of the appellants that the Ontario Act was inconsistent with the Act of the dominion parliament, 38 Vict. c. 20, which requires fire insurance companies to obtain licences from the minister of finance as a condition to their carrying on the business of insurance in the dominion, and that it was beyond the competency of the provincial legislature to subject

(1) Expl. *Bank of Toronto* v. *Lambe*, *post*, p. 387, and *Colonial Building Association* v. *Quebec*, *post*, p. 355; *Ontario* v. *Canada*, *post*, p. 493.

(2) Law Rep. 6 P. C. 31, *ante*, p. 206. (3) 5 App. Cas. 409, *ante*, p. 253.

companies who had obtained such licences, as the appellant companies had done, to the conditions imposed by the Ontario Act. But the legislation does not really conflict or present any inconsistency. The statute of the dominion parliament enacts a general law applicable to the whole dominion, requiring all insurance companies, whether incorporated by foreign, dominion, or provincial authority to obtain a licence from the minister of finance, to be granted only upon compliance with the conditions prescribed by the Act. Assuming this Act to be within the competency of the dominion parliament as a general law applicable to foreign and domestic corporations, it in no way interferes with the authority of the legislature of the province of Ontario to legislate in relation to the contracts which corporations may enter into in that province. The Dominion Act contains the following provision, which clearly recognises the right of the provincial legislature to incorporate insurance companies for carrying on business within the province itself :—

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7 *App. Cas.* p. 115.

"But nothing herein contained shall prevent any insurance company incorporated by or under any Act of the legislature of the late province of Canada or of any province of the dominion of Canada from carrying on any business of insurance within the limits of the late province of Canada, or of such province only according to the powers granted to such insurance company within such limits as aforesaid, without such licence as hereinafter mentioned."

This recognition is directly opposed to the construction sought to be placed by the appellant's counsel on the words "provincial objects," in No. 11 of sect. 92,—"the incorporation of companies with provincial objects," by which he sought to limit these words to "public" provincial objects, so as to exclude insurance and commercial companies.

Ritchie, C.J., refers to an equally explicit recognition of the power of the provinces to incorporate insurance companies contained in an earlier Act of the dominion parliament (31 Vict. c. 48), which was passed shortly after the establishment of the dominion.

The learned Chief Justice also refers to a remarkable section contained in the Act of the dominion parliament consolidating certain Acts respecting insurance, 40 Vict. c. 42. Section 28 of that Act is as follows :—

"This Act shall not apply to any company within the exclusive legislative control of any one of the provinces of Canada, unless such company so desires; and it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall then have the power of transacting its business of insurance throughout Canada."

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This provision contains a distinct declaration by the dominion parliament that each of the provinces had exclusive legislative control over the insurance companies incorporated by it, and therefore is an acknowledgment that such control was not deemed to be an infringement of the power of the dominion parliament as to "the regulation of trade and commerce."

The declarations of the dominion parliament are not, of course, conclusive upon the construction of the British North America Act; but when the proper construction of the language used in that Act to define the distribution of legislative powers is doubtful, the interpretation put upon it by the dominion parliament in its actual legislation may properly be considered.

7 *App. Cas.* *p.* 116.

The opinions of the majority of the Judges in Canada, as summed up by Ritchie, C.J., are in favour of the validity of the Ontario Act. In the present actions, the Court of Queen's Bench and the Court of Appeal of Ontario unanimously supported its legality; and the Supreme Court of Canada, by a majority of three Judges to two, have affirmed the judgments of the provincial Courts. The opinions of the learned Judges of the Supreme Court are stated with great fullness and ability, and clearly indicate the opposite views which may be taken of the Act, and the difficulties which surround any construction that may be given to it.

Taschereau, J., in the course of his vigorous judgment, seeks to place the plaintiff in the action against the Citizens Company in a dilemma. He thinks that the assertion of the right of the province to legislate with regard to the contracts of insurance companies amounts to a denial of the right of the dominion parliament to do so, and that this is, in effect, to deny the right of that parliament to incorporate the Citizens Company, so that the plaintiff was suing a non-existent defendant. Their Lordships cannot think that this dilemma is established. The learned Judge assumes that the power of the dominion parliament to incorporate companies to carry on business in the dominion is derived from one of the enumerated classes of subjects, viz., "the regulation of trade and commerce," and then argues that if the authority to incorporate companies is given by this clause, the exclusive power of regulating them must also be given by it, so that the denial of one power involves the denial of the other. But, in the first place, it is not necessary to rest the authority of the dominion parliament to incorporate companies on this specific and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislature being "the

incorporation of companies with provincial objects," it follows that the incorporation of companies for objects other than provincial falls within the general powers of the parliament of Canada. But it by no means follows (unless indeed the view of the learned judge is right as to the scope of the words "the regulation of trade and commerce") that because the dominion parliament has alone the right to create a corporation to carry on business throughout the dominion that it alone has the right to regulate its contracts in each of the provinces. Suppose the dominion parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended if such a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over "property and civil rights in the province") that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body (1).

7 *App. Cas.* p. 117.

On the best consideration they have been able to give to the arguments addressed to them and to the judgments of the learned judges in Canada, their Lordships have come to the conclusion that the Act in question is valid.

Their Lordships have now to consider separately the two appeals.

The Citizens Insurance Company of Canada v. *Parsons.*

This company, whose incorporation has been already described, has its head office in Montreal, and carries on business in Ontario and the other provinces of Canada.

The respondent insured with the company, through its local agent in the town of Orangeville, Ontario, a building situate in that town, occupied as a hardware store, for one year in $2,500, and, on the 4th of May, 1877, a policy of the company containing this insurance was issued by the agent at Orangeville to him. This policy was made subject to the usual conditions of the company, which were indorsed on it. The following is alone material:—

7 *App. Cas.* p. 118.

"The assured must give notice to this company of any other insurance effected on the same property, and have the same indorsed on this policy, or otherwise acknowledged by the company in writing, and failure to give such notice shall void this policy. . . .

"And this policy is made and accepted under the conditions above

(1) Adh. *Colonial Building Association* v. *Quebec, post*, p. 355.

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mentioned, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for."

The conditions contained in the Ontario Act were not printed in the policy, nor was any reference made to them in it.

On the 3rd of August, 1877, the insured building was destroyed by fire. The respondent thereupon brought the present action.

At the time the insurance was made and the policy issued by the Citizens Company, another insurance had been effected on the same building with the Western Assurance Company, of which no notice was given by the respondent to the Citizens Company, nor was it indorsed on or indicated in the policy, nor did the acknowledgment or assent of the Citizens Company thereto in writing in any way appear. These omissions constituted a breach not only of the conditions indorsed on the policy, but also of the condition in relation to prior insurances contained in the Ontario Act already set out, and, consequently, if either of these conditions forms a part of the contract between the parties, the respondent's action against the company must fail. It is admitted that this is so, but it is contended, on the part of the respondent, that neither the agreed nor the statutory conditions are binding upon him, and that the contract of insurance is subject to no conditions whatever. The Courts of Canada have sustained this contention.

The question turns on the construction of the Ontario Act. It is not disputed by the company that the conditions indorsed on the policy, which form the actual contract between the parties, are, by force of the statute, displaced, inasmuch as they are not shewn to be variations from the statutory conditions in compliance with the provisions of the Act. The question to be decided is whether the effect of this non-compliance is to make the contract subject to the statutory conditions, or to reduce it to a bare contract of insurance without any conditions.

7 *App. Cas. p.* 119.

Sect. 1 enacts that "the conditions set forth in the schedule to the Act shall, as against the insurers, be deemed to be part of every policy." Notwithstanding this express enactment, it is contended that they are not to be so deemed, unless they are printed on the policy. The section, no doubt, goes on to enact, but not in the form of a proviso or condition, that the conditions "shall be printed on every such policy with the heading 'Statutory Conditions'"; but it does not enact that, if there be an omission so to print them, they shall not be deemed to be a part of the contract. Printing the statutory conditions is made a necessary part of the mode prescribed

by the Act of shewing variations from them, and is unquestionably essential to the validity of any such variations, for the section further enacts that if insurers desire to vary the statutory conditions, or to omit any of them, or to add new conditions, "there shall be added, in conspicuous type, and in ink of different colour, words to the following effect:—

"*Variations in Conditions.*

"This policy is issued on the above statutory conditions, with the following variations and additions."

Sect. 2 provides what may be called a penalty for the non-observance of these last-mentioned provisions. It enacts that, unless distinctly indicated in the manner prescribed, "no such variation, addition, or omission shall be legal and binding on the insured," and, "on the contrary,"—here follows the consequence and penalty,—"the policy shall, as against the insurers, be subject to the statutory conditions only." The effect of these enactments in the present case, is that the conditions written on the policy are not binding on the insurer, either by virtue of the actual contract, or as variations from the statutory conditions, because they are not indicated to be so in the manner prescribed by the statute. Printing the statutory conditions is a necessary part of the manner prescribed for indicating these variations, and the penalty provided by the Act for not observing that manner is that *the policy becomes subject to the statutory conditions.* 7 *App. Cas.* p. 120. No provision is made for the omission to print the statutory conditions as a separate default; and their Lordships think, looking at the object and scope of the two sections, that, in the absence of an express enactment to that effect, it cannot be implied that the intention of the legislature was that, in a case where the company has printed its own conditions, but has failed to print the statutory ones, the policy is to be deemed to be without any conditions. Indeed, such an implication would seem to be opposed to the principle of the Act, which is that, except in the case of variations properly indicated, the statutory conditions shall be deemed to be part of every policy.

It was further contended, and the contention seems to have been supported by some of the Judges, that if the statutory conditions, in cases like the present, are to be deemed to be a part of the policy, they form a part of the contract only as against the insurers, and are not binding on the assured. Their Lordships cannot agree with this construction of the Act. The 1st section of the Act, which declares that the statutory conditions shall be deemed to be part of every policy of fire insurance, also contains the words "as against the insurers," and it is evident that these words must have the same

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meaning in both sections. If the construction put on them by the respondent be correct, it would follow that in a case where an insurance company implicity followed the direction of the statute, and printed the statutory conditions on its policies without more, the conditions would still be a part of the contract only as against the company, and the assured would not be bound by them. Such a construction leads to manifest absurdity, and to consequences which the legislature could not have intended. The preamble of the Act shews that the conditions were passed by the legislature as being "just and reasonable." On looking at the twenty-one conditions contained in the schedule, it will be found, as might naturally be expected, that they are all, with a trifling exception, protective of the insurers, though probably less stringent than those usually imposed by the companies themselves. They impose obligations, not on the insurers, but the assured. To construe the statute, therefore, as enacting that these conditions are binding only on the insurers for whose protection they are introduced into the contract, and not on the assured by whom they are to be performed, would be to affirm that the legislature has used words signifying, in effect, that the conditions which it has declared shall be a part of the contract shall not be binding at all. But effect may be given to the words in question without resorting to such a construction of them.

7 *App. Cas.* p. 121.

Strong reasons would be required to shew that the words "as against the insurers" are used in the 2nd section in a different sense from that in which they are used in the 1st, but none can be suggested. The 2nd section provides as an alternative, that unless the variations are shewn in the prescribed manner, the policy shall, as against the insurers, be subject to the statutory conditions only, that is to say, the variations as against the company shall not, and the statutory conditions shall, avail. If the respondent's construction were to prevail, though the consequences under this section might not be so manifestly absurd as in the case already adverted to of a company having simply printed the statutory conditions without more, it would still lead to much injustice; for if a company in making variations, though in all other respects complying with the statute, should not use what might be thought conspicuous type or ink of the right colour, not only would the variations it had attempted to make be of no effect, but it could not invoke the statutory conditions, and the insured would be free from any conditions whatever.

It may possibly have been intended to give to the assured an option, if he thought the company's conditions more favourable to him than the statutory ones, to stand upon the actual conditions; but it could not have been intended, nor does the language of the Act need

such a construction, that he should be set free from both sets of conditions. The meaning of the legislation, though no doubt unhappily expressed, appears to be, that whatever may be the conditions sought to be imposed by insurance companies, no such conditions shall avail against the statutory conditions, and that the latter shall alone be deemed to be part of the policy, and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the prescribed manner.

Their Lordships being of opinion that the policy in this case became subject to the statutory conditions, and there having been a breach of those conditions, the plaintiff's action against the Citizens Insurance Company fails. They will therefore humbly advise Her Majesty to order that the judgments appealed from be reversed, and that the rule obtained by the company to set aside the verdict and enter a nonsuit be made absolute.

7 *App. Cas.* p. 122.

The Queen Insurance Company v. *Parsons.*

This English corporation carries on business at Orangeville through an agent. On the 3rd of August, 1877, the respondent applied to this agent to effect with the company an insurance for $2000 on a general stock of hardware and other goods contained in the building in Orangeville, which was the subject of insurance in the other action, and a premium of $40 was agreed on.

An interim receipt was thereupon given to the respondent by the agent, which is in the following terms:—

"Interim Receipt.

"Fire Department. Interim Protection Note.
"Queen Fire and Life Insurance Company.
"Chief Office, Queen Insurance Buildings, Liverpool.
"Canada Head Office, 191, St. James Street, Montreal.
"No. 33. Orangeville Agency, 3rd August, 1877.

"Mr. William Parsons having this day proposed to effect an insurance against fire, subject to all the usual terms and conditions of this company, for $2000, on the following property in the town of Orangeville, for twelve months, namely, on general stock of hardware, paints, oils, varnishes, window glass, stoves, tinware, castings, hollow ware, plated and fancy goods, lamps, lamp glasses, and general house furnishing goods.

"And having also paid the sum of $40 as the premium on the same, it is hereby held assured under these conditions until the policy

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is delivered or notice given that the proposal is declined by the company, when this interim note will be thereby cancelled and of no effect.

"(Signed) A. M. KIRKLAND,
"Agent to the company.

"N.B.—The deposit will be returned, less the proportion for the period, on application to the agent signing this note, in the event of the proposal being declined by the company. If accepted, a policy will be prepared and delivered within thirty days. If the holder does not receive a policy during the specified period, he should apply to the head office in Montreal."

7 *App. Cas.* p. 123.

A fire happened on the same day, before a policy had been delivered to the respondent.

The action was brought upon the interim receipt. The declaration which was framed upon it, as originally drawn, set out the conditions of the company as those to which the insurance was declared by the interim note to be subject. It is agreed that the declaration was afterwards amended by striking out these conditions, though the amendment does not appear on the record.

Having regard to the arguments addressed to their Lordships, it is only material to refer to one of the company's usual conditions, the 4th, which provides, among other things, that the company will not be liable for any loss or damage when more than 10 lbs. weight of gunpowder is deposited or kept on the premises, unless the same is especially allowed in the body of the policy, and suitable extra premium paid. This quantity of gunpowder is smaller than that mentioned in the statutory condition above set out, 10 (*g*), which provides that the company is not liable for loss or damage occurring while, among other things, more than 25 lbs. weight of gunpowder are stored or kept in the building containing the property insured.

It is admitted that at the time of the fire gunpowder exceeding 10 lbs. in weight was kept in the building destroyed by the fire, and the jury have found that the quantity so kept was less than 25 lbs.

It is contended on the part of the respondent that the contract must, by force of the Ontario Act in question, be treated as being without any conditions; or, if subject to any, to the statutory conditions only.

The judgment of their Lordships in the other action has disposed of the first of these contentions. The second raises the question, whether the company's own conditions or the statutory conditions are to be regarded as forming part of the contract, and its answer

7 *App. Cas.* p. 124.

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depends upon a consideration of the further question, whether the interim note is a policy of insurance within the meaning of that term in the Ontario Act.

This note is not a policy of insurance in the common understanding of that word, and was certainly not understood to be so by the parties to it. It is expressly a contract with a view to a policy, making interim provision until a policy is prepared and delivered. It contains a proposal for insurance, which, if accepted by the company, would result in a policy to be based on the terms of the proposal, and issued by the company to the respondent; the company having an option to decline the proposal, in which case no policy would be delivered. The proposal thus offered for acceptance is "to effect an insurance subject to all the usual terms and conditions of this company," and pending the acceptance or refusal of the company, and until the policy is delivered or notice given that the insurance is declined, the property is "held assured under these conditions." No doubt this last stipulation forms a contract of insurance during this interval; but the whole agreement is preliminary only, and, in substance, the note contains a proposal for a policy to be carried into effect, if accepted, by the delivery of a policy; as subsidiary thereto, and for the convenience of the person proposing to insure, immediate protection is granted to him. The practice of issuing interim notes must have been well known, and apt words might have been found by the legislature to describe them if they had been intended to be included in the Act. It may have been thought that it would be a clog upon the business of insurance, and would place difficulties in the way of obtaining these interim protection notes, if companies were obliged to prepare them with all the fulness and formalities which the Act requires in the case of policies.

Their Lordships, therefore, are disposed to come to the conclusion that the interim note in question is not a policy of insurance within the meaning of the Act. If in any case it should appear that an interim note or any like instrument was intended by the parties to be the complete and final contract of insurance, and that this shape was given to the instrument for the purpose of evading the Act, the present decision would not be opposed to the instrument being treated as a policy of insurance; the ground of their present decision being that the interim note in this case is what it professes to be, preliminary only to the issuing of another instrument, viz., a policy, which the parties bonâ fide intended should be issued.

7 *App. Cas.* p. 125.

These interim protection notes, given by fire insurance companies, bear an analogy to the "slips," commonly used in cases of marine insurance, preliminary to the issuing of policies. The slip contains

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the heads of the contract, and is in itself a contract of insurance, though by the statute law of England, passed for revenue purposes, it could not, until the recent Act of 30 Vict. c. 23, be looked at by a Court of law for any purpose. Since that Act, it may, for some purposes, be given in evidence. In a case (1) in the Court of Queen's Bench in England, in which the nature and effect of these slips came under discussion, Mr. Justice Blackburn says, "As the slip is clearly a contract for marine insurance, and as clearly is not a policy, it is, by virtue of these enactments, not valid, that is, not enforceable at law or in equity; but it may be given in evidence wherever it is, though not valid, material."

What then are the conditions of the contract which is the subject of this action? The interim note contains a proposal by the respondent to effect an insurance on the company's "usual terms and conditions," and the interim insurance is made subject to these conditions. If the contract of the parties had come to be executed, the company would perform it by issuing a policy, subject to its own conditions, if it could legally do so. Indeed, if the assured so required, it would be obligatory on the company to perform it in this manner. In the view their Lordships take of the Act in question, the company might, conformably with its enactments, issue a policy with its own conditions, provided that care was taken to print the statutory conditions, and shew the variations from and the additions to them which its own conditions present, in the manner prescribed. They think that it ought to be presumed that the company would thus perform the contract when it came to issue a policy; and this being so, that its own conditions ought to be read into the interim contract to the extent to which they might lawfully be made a part of the policy when issued, by following the directions of the statute, subject always to the statutable condition that they should be held to be just and reasonable by the Court or judge.

7 *App. Cas.* p. 126.

For these reasons, their Lordships think that the judgment of the Court of Queen's Bench discharging the Appellant's rule for setting aside the verdict for the Plaintiff, and the judgments affirming it, ought to be reversed, but their Lordships do not see their way to decide the question which now arises, and was not determined by the judge who tried the action, or by any of the Courts in Canada, whether the company's condition with respect to the quantity of gunpowder kept in the building containing the property insured is just and reasonable. They think the rule nisi should be kept open, and the action remitted to the Court of Queen's Bench in order to the trial of this question, with a direction that the rule be disposed of accord-

(1) *Ionides* v. *Pacific Insurance Company,* Law Rep. 6 Q. B. 685.

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ing to the decision that may be come to upon it, and they will humbly advise her Majesty to this effect.

CITIZENS INSURANCE COMPANY OF CANADA *v.* PARSONS.

The Appellants, though successful on other points, having failed on the important question of the validity of the Ontario statute, on which special leave to appeal from the judgment of the Supreme Court was granted by this Board, their Lordships think it right to make no order as to the costs of these appeals.

QUEEN INSURANCE COMPANY *v.* PARSONS.

Solicitors for appellants: *Bompas, Bischoff, & Dodson.*
Solicitors for respondent: *Johnston & Harrison.*

DOBIE *v.* TEMPORALITIES BOARD, 7 APP. CAS. 136.

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THE REV. ROBERT DOBIE . . . . APPELLANT;

AND

THE "BOARD FOR THE MANAGEMENT OF THE TEMPORALITIES FUND OF THE PRESBYTERIAN CHURCH OF CANADA IN CONNECTION WITH THE CHURCH OF SCOTLAND," AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA IN THE PROVINCE OF QUEBEC.

British North America Act, 1867, *ss.* 91, 92, 129—*Canada Act*, 22 *Vict. c.* 66—*Invalidity of Quebec Act*, 38 *Vict. c.* 64—*Right to sue—Powers of Synod.*

The powers conferred by the British North America Act, 1867, s. 129, upon the provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of Canada, are precisely co-extensive with the powers of direct legislation with which those bodies are invested by the other clauses of the Act of 1867.

Held, that 22 Vict. c. 66 (of the Parliament of Canada), which created a corporation, having its corporate existence and rights in the provinces of Ontario and Quebec, could not be repealed or modified by the Legislature of either province or by the conjoint operation of both, but only by the Parliament of the Dominion.

Held, further, that the Quebec Act, 38 Vict. c. 64, which assumed to repeal and amend the said 22 Vict. c. 66, and (1) to destroy a corporation created by the Canadian Parliament and substitute a new one; (2) to alter materially the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the province, was invalid.

Canada Insurance Company v. *Parsons* (*ante*, p. 267), approved and distinguished.

In a suit for a declaration of the invalidity of the Quebec Act and relief: *held*, that the plaintiff as a contributor to the fund affected by 22 Vict. c. 66,

* *Present*:—LORD BLACKBURN, LORD WATSON, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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was entitled to sue, and that his suit was not barred by reason of the Quebec Act having been passed in conformity with the resolution of a synod of the Church to which he belonged.

Appeal on special leave from a judgment of the Court of Queen's Bench (June 19, 1880) affirming a judgment of the Superior Court of the District of Montreal (Dec. 29, 1879).

7 *App. Cas.* *p.* 137.

The subject-matter of the appeal was a certain fund eventually known as the "Temporalities Fund." The Acts of Parliament which relate to the creation of the fund are 14 Geo. 3, c. 83, 31 Geo. 3, c. 31, 7 & 8 Geo. 4, c. 62, 3 & 4 Vict. c. 78, and 16 Vict. c. 21.

In pursuance of authority given by 16 Vict. c. 21, the province of Canada passed the Act 18 Vict. c. 82, in consequence of which the Presbyterian Church of Canada in connection with the Church of Scotland (the appellant being one of its members) in accordance with a resolution of its Synod, dated the 11th of January, 1855, arranged with the Government for the creation of a fund (called the Temporalities Fund) of £127,448 *5s.*; and an Act of incorporation for the management thereof was obtained, being 22 Vict. c. 66, of the province of Canada, in accordance with which a Board was elected and administered the fund thereunder.

In the year 1874 it was determined to unite the said Church with three other Churches. Subsequently Ontario Act (38 Vict. c. 75) and Quebec Act (38 Vict. c. 62) were passed to give effect to such union; and contemporaneously therewith Quebec Act, 38 Vict. c. 64, was passed to amend Canadian Act, 22 Vict. c. 66, with a view to the union of the four Churches and to provide for the administration of the Temporalities Fund.

On the 14th of June, 1875, a Synod of the said Church resolved by a large majority (the appellant and nine others dissenting) that the union be effected, and various resolutions were adopted with that view. The appellant and the nine other dissentients protested that they and their adherents remained and still constituted the said Church.

On the 30th of December, 1878, the appellant commenced the proceedings in this suit which, together with the circumstances out of which they arose, are set out in the judgment of their Lordships.

The questions decided in this appeal are (1) as to the invalidity of Quebec Act 38 Vict. c. 64; (2) as to the plaintiff's right to sue; (3) as to the effect of the resolutions, from which he dissented.

7 *App. Cas.* *p.* 138.

Horace Davey, Q.C., and *McMaster*, of the Canadian Bar (*Fullarton* with them), for the appellant, contended that the Quebec Statutes (38 Vict. cc. 62 and 64) and the Ontario statute (38 Vict. c. 75) were

in respect of the provisions material to the case ultrà vires and illegal. Reference was made to the British North America Act, 1867, s. 129, ss. 91 and 92, sub-ss. 7, 13, 16, 11. See also *L'Union St. Jacques de Montréal* v. *Belisle* (1); *Dow* v. *Black* (2); *Cushing* v. *Dupuy* (3). With regard to the meaning of property and civil rights in sect. 92, sub-sect. 13, see Todd's Parliamentary Government in British Colonies, p. 396. As to the state of the Canadian constitution before 1867, see 3 & 4 Vict. c. 35, s. 42, and 3 & 4 Vict. c. 78, s. 3.

It was also contended on behalf of the appellant that the Canadian Act, 22 Vict. c. 66, was still in force, and valid and binding on the respondent corporation and the fund in suit. By virtue thereof the respondents individually and the respondent corporation have acted ultrà vires and illegally in assuming to administer the fund under the provisions of the provincial Acts. The Board is at present illegally constituted. The Presbyterian Church of Canada in connection with the Church of Scotland is the body beneficially interested in the fund in suit. The Presbyterian Church in Canada is not identical therewith. This latter body is composed of a considerable party in the former body, who practically seceded therefrom and formed a union with three other Churches, becoming a new corporation by virtue of the said provincial Acts which purported to transfer to it the funds of all four Churches. The appellant and nine others were opposed to that union, and claim that they are now the Presbyterian Church of Canada in connection with the Church of Scotland, a corporation created by the Canadian statute, and exclusively entitled to the Temporalities Fund. Neither the provincial Acts, nor a resolution of a Synod of each of the four churches declaring that the United Church was identical with itself and possessed of the same authority, rights, privileges, and benefits, were operative to establish any identity between the United Church and the corporation created by 22 Vict. c. 66.

The appellant's locus standi is as a minister of the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland, and as one of those entitled in 1853 and ever since to share in the proceeds of the Clergy Reserve Fund, and as one of the founders of the Temporalities Fund under the minutes of the synod of January 11, 1855, and as interested in that fund under 22 Vict. c. 66, and the other statutes in that behalf. He claims that the Presbyterian Church in Canada is not entitled to the rights, property, and status of the Church to which he belongs, and which is alone entitled to the rights and property reserved thereto by 22 Vict. c. 66.

7 *App. Cas.* p. 139.

(1) Law Rep. 6 P. C. 31, *ante*, p. 206.
(2) Law Rep. 6 P. C. 272, *ante*, p. 212.
(3) 5 App. Cas. 409, *ante*, p. 253.

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Reference was made to *Attorney-General* v. *Welsh* (1); *Attorney-General* v. *Munro* (2); *Attorney-General* v. *Murdoch* (3); *Shore* v. *Wilson* (4); *Attorney-General* v. *Pearson* (5).

Benjamin, Q.C., and *J. L. Morris* of the Canadian Bar (*Jeune* with them), for the respondents, contended that the provincial Acts in question were all of them within the scope of provincial legislative authority, and were valid and binding Acts. It is not the case that the powers of the dominion and provincial Legislatures are mutually exclusive. If this corporation, deriving its origin from the Canadian Parliament, had property in two provinces, the provincial Legislatures might annex separate incidents to that property. The Act impugned in this case is within sect. 92, sub-sects. 7, 11, 13 of the Act of 1867; and, moreover, the subject of the Quebec Act (38 Vict. c. 64) was provincial, the domicil of the respondent corporation being in Montreal, and its funds invested in the province of Quebec. If either provincial Legislature was singly incompetent to repeal or amend a Canadian Act, yet the conjoint operation of both Legislatures was adequate for that purpose.

It was further contended that the appellant seceded from the Presbyterian Church of Canada in connection with the Church of Scotland, and by his secession ceased to be a minister in connection therewith, and ceased to have any claim, or to be entitled to any share of the fund in suit. The history and constitution of that Church are such that its Synod had full power to effect a union with the other three Churches without destroying its identity. In 1844 its Synod passed an Act declaring its supreme and uncontrolled jurisdiction, discipline, and government in regard to all matters ecclesiastical and spiritual. The appellant assented to that Act by a formal instrument at the time of his ordination. He was therefore bound by the resolutions in favour of union, and being bound by the resolutions he was estopped from objecting to the validity of the statute which carried them into effect. There is evidence to shew that the Church remained the same both before and after the union, and that the Church of Scotland in Scotland recognised and approved the union. If the Church had a right to effect the union, the property followed, and the respondents could not be deprived thereof by doing a lawful thing in a lawful way. Moreover, the rights of persons entitled to beneficial interests in respect of the fund in question were unaffected by the union, or by the provincial Acts. The claim of the appellant

7 *App. Cas. p.* 140.

(1) 4 Hare, 572.
(2) 2 De G. & S. 122.
(3) 7 Hare, 445, and on appeal, 1 De G. M. & G. 86.
(4) 9 Cl. & F. 355.
(5) 3 Mer. 409.

was merely to a certain payment out of the fund, and there was no allegation or evidence of a demand and refusal in respect of such claim.

Davey, Q.C., replied.

The judgment of their Lordships was delivered by

LORD WATSON :—

The first question raised in this appeal is, whether the Legislature of the province of Quebec had power, in the year 1875, to modify or repeal the enactments of a statute passed by the Parliament of the province of Canada in the year 1858 (22 Vict. c. 66), intituled "An Act to incorporate the Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland."

The fund subject to the administration of the Board constituted by the Act of 1858 consisted of a capital sum of £127,448. 5*s.* sterling, which was paid by the Government of Canada under the following circumstances :—The ministers of the Presbyterian Church of Canada, in connection with the Church of Scotland, were entitled, by virtue of certain Imperial statutes, to an endowment or annual subsidy out of the revenues derived from colonial lands, termed clergy reserves, and from moneys obtained by the sale of portions of these lands, supplemented, when necessary, from the Exchequer of Great Britain. But this connection between the Presbyterian Church and the State was at length dissolved. In 1853 an Act was passed by the British Parliament (16 Vict. c. 21), authorizing the Legislature of the province of Canada to dispose of the clergy reserves, and investments arising from sales thereof, but reserving to the clergy the annual stipends then enjoyed by them, and that during the period of their natural lives or incumbencies. In 1855 the Legislature of Canada, in exercise of the power thus conferred, enacted that all union between Church and State should cease, and that those ministers who were admitted to office after the 9th of May, 1853, being the date of the Act, 16 Vict. c. 21, should receive no allowance from the Government. It was, however, provided that the rights of ministers entitled at that date to participate in the state subsidy, should be reserved entire, power being given to the Governor General in Council to commute the annual stipend payable to each individual so entitled to the capital value of such stipend, calculated at six per cent. on the probable life of the annuitant.

7 *App. Cas.* p. 141.

All the ministers interested consented to accept the statutory terms of commutation, and agreed to bring the amounts severally payable to

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them into one common fund, to be settled for behoof of the Presbyterian Church of Canada in connection with the Church of Scotland. In accordance with resolutions unanimously adopted by the Church in Synod assembled on the 11th of January, 1855, they further agreed that the interest of the fund should be devoted, in the first instance, to the payment of an annual stipend of £112. 10*s.* to each commutor, and that the claim next in order of preference should be that of ministers then on the roll, who had been admitted since the 9th of May, 1853. The arrangement thus effected was carried out by eight Commissioners duly appointed for that purpose, of whom three were ministers and five were laymen. They received payment of the commutation moneys to the amount already stated; and in order to provide for the management of the fund thus obtained, the Legislature of the province of Canada, upon the application of the Commissioners, passed the Act 22 Vict. c. 66.

7 *App. Cas.* *p.* 142.

By the first clause of the Act in question the Commissioners were, along with four additional members and their successors, declared to be a body politic and corporate, by the name of the "Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland;" and the funds held by them as Commissioners were vested in the board "in trust for the said Church," subject to the condition that the annual interest thereof should remain chargeable with the stipends and allowances payable to the parties entitled thereto, in terms of the arrangement under which the fund was contributed by the commutors. It was enacted that at the first meeting of Synod held after the passing of the Act, three Commissioners, one minister and two laymen, should retire from the Board, and that seven new members, consisting of four ministers and three laymen, should be elected by the Synod. The Board thus reconstituted was composed of six ministers and six laymen, and it was provided that at each annual meeting of the Synod held thereafter two ministers and two laymen were to retire by rotation, and that four new members, two clerical and two lay, should be elected in their stead. It was expressly enacted that all members of the Board should also be members of the Presbyterian Church of Canada in connection with the Church of Scotland; and provision was made for filling up vacancies occasioned by the death or resignation of a member, by his removal from the province of Canada, or by his leaving the communion of the said Church.

In the year 1874 serious proposals had been made for an incorporative union between the Presbyterian Church of Canada in connection with the Church of Scotland, the Canada Presbyterian Church, the Church of the Maritime Provinces in connection with the Church of

Scotland, and the Presbyterian Church of the Lower Provinces. The old Parliament of the province of Canada had by this time been abolished, and its legislative power had been distributed between the two provincial Legislatures of Ontario and Quebec, and the new Parliament of the Dominion of Canada, under the provisions of the "British North America Act, 1867." With the view of facilitating the contemplated union of the Churches, an Act of the Legislature of Quebec was passed in February, 1875 (38 Vict. c. 62), in order to remove any obstruction which might arise from the form and designation of the several trusts or acts of incorporation by which the property of the Churches was held and administered. By the 11th section of that Act, it was provided that, in the event of union taking place, the members then constituting the board for the management of the Temporalities Fund, under the Act of 1858, should remain in office, and pay over the revenue to the persons previously entitled to it; that any revenue not required for that purpose should pass to and be subject to the disposal of the united Church; and that any part of the fund remaining after satisfying the claim of the last survivor of those entitled should belong to the Supreme Court of the United Church, and be applied to the aid of weak congregations. It was by the same clause enacted that vacancies occurring in the Temporalities Fund Board should not be filled up in the manner theretofore observed, but should be filled up in the manner provided by another Act of the Quebec Legislature.

7 *App. Cas.* p. 143.

The last-mentioned statute (38 Vict. c. 64), which received the assent of the Governor-General in Council upon the same day as the preceding, was passed with the professed object of amending the Act of the Parliament of the province of Canada, 22 Vict. c. 66. It was thereby enacted that, from the time when the union was effected, the annual allowances to which they were previously entitled were to be continued by the Temporalities Board to ministers and probationers then on the roll of the Presbyterian Church of Canada in connection with the Church of Scotland, and these were to be paid, so far as necessary, out of the capital of the fund, and that any surplus of revenue or capital, after satisfying these charges, should be at the disposal of the united Church. Ministers and probationers of the Church interested in the Temporalities Fund, who might decline to become parties to the union, were, however, to retain all rights previously competent to them until the same lapsed or were extinguished. The constitution of the Board of Management was altered by the 3rd and 8th clauses of the Act. The 3rd clause is in these terms: "As often as any vacancy in the Board for the management of the said Temporalities Fund occurs, by death, resignation, or other-

7 *App. Cas.* p. 144.

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wise, the beneficiaries entitled to the benefit of the said fund may each nominate a person, being a minister or member of the said united Church, or, in the event of there being more than one vacancy, then one person for each vacancy, and the remanent members of the said Board shall thereupon, from among the persons so nominated as aforesaid, elect the person or number of persons necessary to fill such vacancy or vacancies, selecting the person or persons who may be nominated by the largest number of beneficiaries, but, in the event of failure on the part of the beneficiaries to nominate as aforesaid, the remanent members of the Board shall fill up the vacancy or vacancies from among the ministers or members of the said united Church." The eighth clause enacts that the 3rd section shall continue in force until the number of beneficiaries is reduced below fifteen, upon which occurrence the Board is to be continued by the remanent members filling up vacancies from among the ministers or members of the united Church. By the 10th section it was declared that the Act should come into force as soon as a notice was published in the Quebec *Official Gazette* to the effect that the union had been consummated, and that the articles of union had been signed by the moderators of the respective Churches.

On the 14th of June, 1875, the Synods of the four Churches met at Montreal, and in each a resolution was carried in favour of union. In the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland, it was resolved, by a very large majority of its members, that the four Churches should be united and form one Assembly, to be known as "The General Assembly of the Presbyterian Church in Canada," and that the united Church should possess the same authorities, rights, privileges, and benefits to which the Presbyterian Church in Canada in connection with the Church of Scotland was then entitled, excepting such as had been reserved by Acts of Parliament. The minority, which consisted of the Appellant, the Rev. Robert Dobie, and nine other members, dissented from the action of the Synod, and protested that they, and those who might choose to adhere to them, remained and still constituted the Presbyterian Church of Canada in connection with the Church of Scotland.

7 *App. Cas.* p. 145.

On the 15th of June, 1875, the majority of the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland, and the Synods of the other uniting Churches, met in general assembly, when the articles of union were signed by the moderators of each of the four Churches; and thereupon one of the moderators, with the consent and concurrence of the rest, declared the four Churches to be united in one Church, represented by that its first general assembly, to be designated and known as "The General

Assembly of the Presbyterian Church in Canada." Notice of the union having been thus consummated was duly published in the Quebec *Official Gazette*.

After publication of the notice the constitution of the Board for managing the Temporalities Fund was altered, and the fund administered in conformity with the provisions of the Quebec Act, 38 Vict. c. 64. In December, 1878, the Rev. Robert Dobie, who, with the other members of the protesting minority of 1875, and their adherents, maintains that they alone represent and constitute the Presbyterian Church of Canada in connection with the Church of Scotland, instituted, by petition to the superior Court for Lower Canada, the proceedings in which the present appeal has been taken. The leading conclusions of the petition are to have it adjudged and declared, (1) that the Legislature of Quebec had no power to alter the constitution of the Board or the purposes of the trust created by the Canadian Act, 22 Vict. c. 66, and consequently that the administration of the trust as carried on in terms of the Provincial Act of 1875 is illegal; (2) that the protesting minority of the Synod of 1875, and its adherents, are now the Presbyterian Church of Canada in connection with the Church of Scotland, and that certain ministers of the United Church, who were members of the majority, had, by reason of the union, forfeited all right to participate in the benefits of the Temporalities Fund; and, (3) to have an injunction against the Board as then constituted, acting in prejudice of the rights of the Appellant, and others beneficially interested in the statutory trust of 1858. Upon the 31st of December, 1878, the appellant's application was heard before Mr. Justice Jettè, who made an order for summoning the respondents, and also issued an interim injunction, which the learned judge dissolved, after fully hearing both parties, on the 31st of December, 1879, and at the same time dismissed the appellant's petition, with costs. This decision was, on appeal to the Court of Queen's Bench for Lower Canada, affirmed, in accordance with the opinions of the majority of the judges. 7 *App. Cas.* p. 146.

The judgments of Mr. Justice Jettè in the Court of first instance, and of Chief Justice Dorion and Mr. Justice Monk in the Court of Queen's Bench, are based exclusively upon the competency of the Quebec Legislature to pass the Act 38 Vict. c. 64, and the consequent validity of that statute. On the other hand Mr. Justice Ramsay and Mr. Justice Tessier were of opinion that the appellant was entitled to an injunction, on the ground that the Act 38 Vict. c. 64 was invalid, and that the majority of the Presbyterian Church of Canada, in connection with the Church of Scotland, had no power to communicate any interest in the Temporalities Fund of that Church to the religious

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bodies with whom they had chosen to unite themselves in 1875. Mr. Justice M'Cord was of opinion, with his Brethren Ramsay and Tessier, JJ., that the Act of the Legislature of Quebec was ultrà vires, but he held that the majority of the Presbyterian Church of Canada in connection with the Church of Scotland, had undoubted power to admit into that Church, as members of it, the three religious bodies with whom they had entered into union. Consequently the learned justice, though differing in opinion from his Brethren Dorion, C.J., and Monk, J., agreed with them in result.

Whether the Legislature of Quebec had power to pass the Act 38 Vict. c. 64, is the question first requiring consideration, because if it be answered in the affirmative the case of the appellant entirely fails. The determination of that question appears to their Lordships to depend upon the construction of certain clauses in the British North America Act, 1867. There is no room in the present case for the application of those general principles of constitutional law which were discussed by some of the judges in the Courts below and which were founded on in argument at the Bar. There is really no practical limit to the authority of a supreme Legislature except the lack of executive power to enforce its enactments. But the Legislature of Quebec is not supreme; at all events it can only assert its supremacy within those limits which have been assigned to it by the Act of 1867.

7 *App. Cas.* *p.* 147.

The Act of the Parliament of the province of Canada, 22 Vict. c. 66, was, after the passing of the British North America Act, 1867, continued in force within the provinces of Ontario and Quebec by virtue of sect. 129 of the latter statute, which inter alia enacts that except as therein provided all laws in force in Canada at the time of the union thereby effected, shall continue in Ontario and Quebec as if the union had not been made. But that enactment is qualified by the provision that all such laws with the exception of those enacted by the Parliaments of Great Britain or of the United Kingdom of Great Britain and Ireland, shall be subject "to be repealed, abolished, or altered by the Parliament of Canada or by the Legislature of the respective provinces according to the authority of the Parliament or that Legislature under this Act." The powers conferred by this section upon the provincial Legislatures of Ontario and Quebec to repeal and alter the statutes of the old Parliament of the province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867. (1) In order therefore to ascertain how far the provincial Legislature of Quebec had power to alter and amend the Act of 1858 incorporating the Board for the management of the

(1) Appl. *Ontario* v. *Canada*, *post*, p. 496.

Temporalities Fund, it becomes necessary to revert to sects. 91 and 92 of the British North America Act, which enumerate and define the various matters which are within the exclusive legislative authority of the Parliament of Canada, as well as those in relation to which the Legislatures of the respective provinces have the exclusive right of making laws. If it could be established that, in the absence of all previous legislation on the subject the Legislature of Quebec would have been authorized by sect. 92 to pass an Act in terms identical with the 22 Vict. c. 66, then it would follow that the Act of the 22nd Vict. has been validly amended by the 38 Vict. c. 64. On the other hand, if the Legislature of Quebec has not derived such power of enactment from sect. 92, the necessary inference is that the legislative authority required in terms of sect. 129 to sustain its right to repeal or alter an old law of the Parliament of the province of Canada is in this case wanting, and that the Act 38 Vict. c. 64, was not intra vires of the Legislature by which it was passed. 7 *App. Cas.* *p.* 148.

The general scheme of the British North America Act, 1867, and in particular the general scope and effect of sects. 91 and 92 have been so fully commented upon by this Board in the recent cases of the *Citizen Insurance Company of Canada* v. *Parsons* (1) and the *Queen Insurance Company* v. *Parsons* (2) that it is unnecessary to say anything further upon that subject. Their Lordships see no reason to modify in any respect the principles of law upon which they proceeded in deciding those cases; but in determining how far these principles apply to the present case it is necessary to consider to what extent the circumstances of each case are identical or similar.

The case of the *Citizen Insurance Company of Canada* v. *Parsons* (1) comes nearest in its circumstances to the present, as in that case the appellant company was incorporated by and derived all its statutory rights and privileges from an Act of the province of Canada, whereas the Queen Insurance Company was incorporated under the provisions of the British Joint Stock Companies Act, 7 & 8 Vict. c. 110. In both cases the validity of an Act of the Legislature of Ontario was impeached on the ground that its provisions were ultrà vires of a provincial Legislature and were not binding unless enacted by the Parliament of Canada. It was contended on behalf of the Citizen Insurance Company that the statute complained of was invalid in respect that it virtually repealed certain rights and privileges which they enjoyed by virtue of their Act of incorporation. That contention was rejected, and the decision in that case would be a precedent fatal to the contention of the appellant if the provisions of the Ontario Act, 39 Vict. c. 31, and the Quebec Act, 38 Vict. c. 64, were of the

(1) *Ante*, p. 267. (2) *Ante*, p. 267.

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7 *App. Cas.* p. 149.

same or substantially the same character. But upon an examination of these two statutes it becomes at once apparent that there is a marked difference in the character of their respective enactments. The Ontario Act merely prescribed that certain conditions should attach to every policy entered into or in force for insuring property situate within the province against the risk of fire. It dealt with all corporations, companies, and individuals alike who might choose to insure property in Ontario—it did not interfere with their constitution or status, but required that certain reasonable conditions should be held as inserted in every contract made by them. The Quebec Act, 38 Vict. c. 64, on the contrary deals with a single statutory trust and interferes directly with the constitution and privileges of a corporation created by an Act of the province of Canada and having its corporate existence and corporate rights in the province of Ontario as well as in the province of Quebec. The professed object of the Act and the effect of its provisions is not to impose conditions on the dealings of the corporation with its funds within the province of Quebec, but to destroy, in the first place, the old corporation and create a new one, and, in the second place, to alter materially the class of persons interested in the funds of the corporation.

According to the principles established by the judgment of this Board in the cases already referred to, the first step to be taken, with a view to test the validity of an Act of the provincial Legislature is to consider whether the subject-matter of the Act falls within any of the classes of subjects enumerated in sect. 92. If it does not then the Act is of no validity. If it does then these further questions may arise viz., "whether notwithstanding that it is so the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the provincial Legislature is or is not thereby overborne." (1)

Does then the Act, 38 Vict. c. 64, fall within any of the classes enumerated in sect. 92 and thereby assigned to the provincial Legislatures? Their Lordships are of opinion that it does not; and consequently that its enactments are invalid, and that the constitution and duties of the Board for managing the Temporalities Fund must still be regulated by the Act of 1858.

It was contended for the respondents that the Quebec Act of 1875 is within one or more of these three classes of subjects enumerated in sect. 92—

> "(7.) The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province other than marine hospitals."

(1) Appr. *Crown Grain Company* v. *Day*, *post*, p. 661.

"(11.) The incorporation of companies with provincial objects."
"(13.) Property and civil rights in the province."

The most plausible argument for the respondents was founded upon the terms of Class (13), but it has failed to satisfy their Lordships that the statute impeached by the appellant is a law in relation to property and civil rights within the province of Quebec.

The Quebec Act of 1875 does not, as has already been pointed out, deal directly with property or contracts affecting property, but with the civil rights of a corporation, and of individuals, present or future, for whose benefit the corporation was created and exists. If these rights and interests were capable of division according to their local position in Ontario and Quebec respectively, the Legislature of each province would have power to deal with them so far as situate with the limits of its authority. If, by a single Act of the Dominion Parliament, there had been constituted two separate corporations, for the purpose of working, the one a mine within the province of Upper Canada, and the other a mine in the province of Lower Canada, the Legislature of Quebec would clearly have had authority to repeal the Act so far as it related to the latter mine and the corporation by which it was worked. *7 App. Cas. p. 150.*

The Quebec Act 38 Vict. c. 64 does not profess to repeal and amend the Act of 1858, only in so far as its provisions may apply to or be operative within the province of Quebec, and its enactments are apparently not framed with a view to any such limitation. The reason is obvious, and it is a reason which appears to their Lordships to be fatal to the validity of the Act. The corporation and the corporate trust, the matters to which its provisions relate, are in reality not divisible according to the limits of provincial authority. In every case where an Act applicable to the two provinces of Quebec and Ontario can now be validly repealed by one of them, the result must be to leave the Act in full vigour within the other province. But in the present case the legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the province of Ontario, as well as the rights and interests of individual corporators in that province. In addition to that, the fund administered by the Corporate Board under the Act of 1858 is held in perpetuity for the benefit of the ministers and members of a church having its local situation in both provinces, and the proportion of the fund and its revenues falling to either province is uncertain and fluctuating, so that it would be impossible for the Legislature of Quebec to appropriate a definite share of the corporate funds to their own province without trenching on the rights of the corporation in Ontario. *7 App. Cas. p. 151.*

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These observations regarding Class (13) apply with equal force to the argument of the respondents founded on Classes (7) and (11). Even assuming that the Temporalities Fund might be correctly described as a "charity" or as an "eleemosynary institution," it is not in any sense established, maintained, or managed "in or for" the province of Quebec; and if the Board incorporated by the Act of 1858 could be held to be a "company" within the meaning of Class (11), its objects are certainly not provincial.

The respondents further maintained that the Legislature of Quebec had power to pass the Act of 1875 in respect of these special circumstances: (1), that the domicil and principal office of the Temporalities Board is in the city of Montreal; and (2), that its funds also are held or invested within the province of Quebec. These facts are admitted on record by the appellant, but they do not affect the question of legislative power. The domicil of the corporation is merely forensic, and cannot alter its statutory constitution as a Board in and for the provinces of Upper Canada and Lower Canada. Neither can the accident of its funds being invested in Quebec give the Legislature of that province authority to change the constitution of a corporation with which it would otherwise have no right to interfere. When funds belonging to a corporation in Ontario are so situated or invested in the province of Quebec, the Legislature of Quebec may impose direct taxes upon them for provincial purposes, as authorized by sect. 92, (2), or may impose conditions upon the transfer or realization of such funds; but that the Quebec Legislature shall have power also to confiscate these funds, or any part of them, for provincial purposes, is a proposition for which no warrant is to be found in the Act of 1867.

7 *App. Cas.* p. 152.

Last of all it was argued for the respondents that, assuming the incompetency of either provincial Legislature acting singly to interfere with the Act of 1858, that statute might be altered or repealed by their joint and harmonious action. The argument is based upon fact, because in the year 1874 the Legislature of Ontario passed an Act (38 Vict. c. 75), authorizing the union of the four Churches, and containing provisions in regard to the Temporalities Fund and its Board of management substantially the same with those of the Quebec Act, 38 Vict. c. 62, already referred to. It is difficult to understand how the maxim juncta juvant is applicable here, seeing that the power of the provincial Legislature to destroy a law of the old province of Canada is measured by its capacity to reconstruct what it has destroyed. If the Legislatures of Ontario and Quebec were allowed jointly to abolish the Board of 1858, which is one corporation in and for both provinces, they could only create in its room two corporations, one of which would exist in and for Ontario

and be a foreigner in Quebec, and the other of which would be foreign to Ontario but a domestic institution in Quebec. Then the funds of the Ontario corporation could not be legitimately settled upon objects in the province of Quebec, and as little could the funds of the Quebec corporation be devoted to Ontario, whereas the Temporalities Fund falls to be applied either in the province of Quebec or in that of Ontario, and that in such amounts or proportions as the needs of the Presbyterian Church of Canada in connection with the Church of Scotland, and of its ministers and congregations, may from time to time require. The Parliament of Canada is therefore the only Legislature having power to modify or repeal the provisions of the Act of 1858.

On the assumption that the Legislature of Quebec had not power to alter the provisions of the Act, 22 Vict. c. 66, the respondents still maintain that the appellant cannot prevail in the present action, in respect that he has not sufficient interest to entitle him to sue, and that, even if he has such interest, he is barred from challenging the Act of 1875, by the resolutions of the majority of the Synod, which are said to be binding upon him.

As regards the first of these objections, it is true that the appellant's right to an annuity from the Temporalities Fund is reserved in its integrity by the Act which he impugns, and his own pecuniary interests are, therefore, not affected by its provisions. But the appellant is not a mere annuitant, and his right to an annual allowance does not constitute his only connection with the fund. He is likewise one of the commutors—one of the persons by whom the fund was contributed for the purposes of the Act, 22 Vict. c. 66—and in that capacity he has a plain interest and consequent right, to insist that the fund shall be administered in strict accordance with law.

7 *App. Cas.* p. 153.

The second objection is derived from the resolutions in favour of union carried by the majority of the Synod of the Presbyterian Church of Canada, in connection with the Church of Scotland, upon the 14th of June 1875. The Quebec Act, 38 Vict. c. 64, deals with the Temporalities Fund in conformity with these resolutions; and it is the contention of the respondents that the appellant is bound by the resolutions, and cannot, therefore, impeach the statute which gives effect to them. That is a startling proposition. If the Legislature of Quebec was incompetent to enact the Statute of 1875, it is not easy to understand how the Synod could have power, either directly or indirectly, to validate that Act, or to set aside the enactments of 22 Vict. c. 66. The respondents do not, indeed, allege that the Synod was possessed of legislative powers, but they assert

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that the majority, by resolving that the fund, settled under the Act 22 Vict. c. 66, should in future be administered according to a scheme inconsistent with the provisions of the Act, bound all its members to acquiesce in that new course of administration, and to abstain from enforcing the statute law of the land. It may be doubted whether a Court of law would sustain such an obligation, even if it were expressly undertaken; but it is unnecessary to discuss that point, because their Lordships are of opinion that the respondents have failed to establish that the appellant, as a member of the Presbyterian Church in connection with the Church of Scotland undertook any obligation to that effect.

Whether the appellant is bound, as alleged by the respondents, is, in this case, a question relating exclusively to civil rights, and must therefore be dealt with as a matter of contract between him and the Synod or Church of which he was admittedly a member at the time when the resolutions in favour of union were carried. In the case of a non-established Presbyterian Church, its constitution or in other words the terms of the contract under which its members are associated, are rarely embodied in a single document, and must, in part at least, be gathered from the proceedings and practice of its judicatories. Every person who becomes a member of a Church so constituted must be held to have satisfied himself in regard to the proceedings and practice of its Courts, and to have agreed to submit to the precedents which these establish. The respondents were therefore justified in referring to the minutes of the Synod from 1831 to 1875, for the purpose of shewing the extent of the power vested in majorities by the constitution of the Church. The minutes, which were founded upon by counsel for the respondents, afford abundant evidence to the effect that, in all matters which the Synod was competent to deal with and determine, the will of the majority as expressed by their vote was binding upon every member of the Synod, a proposition which the appellant did not dispute. But they contain nothing whatever to shew that in cases where the administration of Church property was regulated by statute, the Synod ever asserted its right to set aside that legal course of administration, and to restrain dissentient members from challenging any departure from it.

7 App. Cas. p. 154.

Their Lordships are therefore of opinion that the appellant is entitled to have it declared that notwithstanding the provisions of the Quebec Act of 1875, the constitution of the Board and the administration of the Temporalities Fund are still governed by the Canadian Act of 1858, and that the respondent Board is not duly constituted in terms of that Act; and also to have an injunction restraining the

respondents from paying away or otherwise disposing of either the principal or income of the fund.

The appellant in his application to the Court below asks a declaration to the effect that the fund in question is held by the respondents "in trust for the benefit of the Presbyterian Church of Canada in connection with the Church of Scotland, and for the benefit of the ministers and missionaries who retain their connection therewith, and who have not ceased to be ministers thereof, and for no other purpose whatever." It is obviously inexpedient to make any declaration of that kind. It would be a mere repetition of the language of the Act of 1858 by which the trust is regulated and would decide nothing as between the parties to the present suit.

7 *App. Cas.* p. 155.

The appellant also seeks to have it declared that six reverend gentlemen who at and prior to the union of 1875 were members of the Presbyterian Church of Canada in connection with the Church of Scotland have ceased to possess that character, and that they have no right to the benefits of the Temporalities Fund; and he concludes for an injunction against the respondent corporation making any payment to them. Their Lordships are of opinion that these are matters which cannot be competently decided in the present action. Their decision depends upon the answer to be given to the question which Church or aggregate of Churches is now to be considered as being or representing the Presbyterian Church of Canada in connection with the Church of Scotland within the meaning of the Act 22 Vict. c. 66? But the two Churches which appear from the record to have rival claims to that position are not represented in this action; and of the six ministers whose pecuniary interests are assailed by the appellant he has only called one, the Rev. Dr. Cook, as a respondent. That question between the Churches must be determined somehow before a constitutional Board can be elected; and unless the dominion Parliament intervenes there will be ample opportunity for new and protracted litigation. It cannot be determined now because the appellant has not asked any order from the Court in regard to the formation of the new Board, and has not made the individuals and religious bodies interested parties to this cause.

Substantial success being with the appellant he must have his costs as against the respondents. But their Lordships are of opinion that neither the respondents' own costs nor those in which they are found liable to the appellant ought to come out of the trust fund which they are holding and administering without legal title. The appellant's costs must therefore be paid by the members of the respondent corporation as individuals.

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Their Lordships will accordingly humbly advise Her Majesty that the judgments under appeal ought to be reversed, and that the cause should be remitted to the Court of Queen's Bench, Lower Canada, with directions to that Court to give effect to the declarations recommended by this Board, and also to issue in the appellant's favour an injunction and decree for costs as directed by this Board.

Solicitors for the appellant: *Simpson, Hammond, & Co.*
Solicitors for the respondents: *Bompas, Bischoff, & Dodgson.*

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May 2, 3; *June* 23.

RUSSELL *v.* THE QUEEN, 7 APP. CAS. 829.

CHARLES RUSSELL . . . . . APPELLANT;

AND

THE QUEEN ON THE INFORMATION OF JOHN WOODWARD . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF NEW BRUNSWICK.

British North America Act, ss. 91, 92, *sub-ss.* 9, 13, 16—*Legislative Powers of the Dominion Parliament—Validity of Canada Temperance Act,* 1878.

Held, that the Canada Temperance Act, 1878, which in effect, wherever throughout the Dominion it is put in force, uniformly prohibits the sale of intoxicating liquors except in wholesale quantities or for certain specified purposes, regulates the traffic in the excepted cases, makes sales of liquors in violation of the prohibitions and regulations contained in the Act criminal offences, punishable by fine and for the third or subsequent offence by imprisonment, is within the legislative competence of the Dominion Parliament.

The objects and scope of the Act are general, viz., to promote temperance by means of a uniform law throughout the Dominion. They relate to the peace, order, and good government of Canada, and not to the class of subjects "property and civil rights." Provision for the special application of the Act to particular places does not alter its character as general legislation.

Appeal from a judgment of the Supreme Court given in Hilary Term 44 Vict. discharging a rule nisi granted by the said Court upon the application of the respondent for a writ of certiorari to remove into the said Court a certain conviction made by John L. Marsh, Esq., the police magistrate of the city of Fredericton, within the province, against the respondent for unlawfully selling, bartering, and disposing

* *Present:*—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR JAMES HANNEN, and SIR RICHARD COUCH.

of intoxicating liquors contrary to the second part of the Canada Temperance Act, 1878.

The question raised in this appeal was as to the validity of the said Act. The Supreme Court followed the decision of the Supreme Court of Canada in the case of *City of Fredericton* v. *The Queen* (1), which upheld the validity of the Act, reversing a decision of the New Brunswick Supreme Court which declared its invalidity as being ultra vires the Dominion Parliament. 7 *App. Cas. p.* 830.

Benjamin, Q.C., and *Reginald Brown*, for the appellant, contended that the Dominion Parliament had no power to pass the Act in question: see *Citizens Insurance Company* v. *Parsons* (2), according to which it is not necessary to shew that the Act comes exclusively within sect. 91 of the British North America Act, 1867, for the two sections may be read together. Reference was made to sects. 91 and 92, sub-sects. 9, 13, 16, to sects. 94 and 121. The rules laid down in *Parsons' Case* are that it must be ascertained (1) whether the subject comes within any of the classes enumerated under sect. 92; (2) if so, does it also come within any of the classes enumerated under sect. 91; (3) if it is within both, is the power of the provincial Legislature overborne by the power of the Dominion Parliament. Up to the time of the passing of the Act of 1867 the Legislatures of the several provinces had always exercised the power of dealing with the sale of liquors within their provinces, and with the granting of licenses for the purposes of local revenue. They distributed the right of granting such licences amongst the various municipalities for purely local purposes: see New Brunswick Acts, 11 Vict. c. 61, s. 59; 17 Vict. c. 15, s. 21; 22 Vict. c. 8, s. 74; 36 Vict. c. 10, s. 32. All provided fees for licenses. Under the provincial Acts prior to 1867 the municipalities had a revenue, the power of legislating with regard to which is preserved to the Provincial Legislatures by sub-sect. 9 of sect. 92. These licensing powers were continued in the municipalities by sect. 29 of 39 Vict. c. 105 (Consolidated Statutes of New Brunswick, 1876), and were in force up to the 1st of May, 1879. The local Legislatures had exclusive power to raise money by licenses, and the Dominion cannot interfere therewith by legislating with regard to the commodities which are the subject of licenses. The Legislature having treated this as a local matter, can the Courts say that it is not? This is a law in relation to licenses of a local nature; if a criminal law it comes under sub-sect. 15 of sect. 92. It is not a law for the peace, order, and good government of Canada, for it is a law relating to a locality. If it applied to the whole Dominion without

(1) 3 Supreme Court of Canada Rep. p. 505. (2) 7 App. Cas. 96, *ante*, p. 267.

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7 *App. Cas.* p. 831.

local option it would then be within the power of the Dominion Parliament. Reference was made to *Keep* v. *M'Lellan*, decided 12th December, 1876 (1), and *L'Union St. Jacques de Montréal* v. *Bélisle* (2). Even if the Dominion Parliament possessed the powers which it assumed to exercise by this Act, it had no power to delegate them and to give local authorities the right to say whether the provisions of the Act should be operative or not.

[SIR MONTAGUE E. SMITH:—Their Lordships do not require to hear the respondent's counsel in reference to sub-sects. 9 and 13, but only in regard to sub-sect. 16.]

Maclaren, Q.C., and *Fullarton*, for the respondent:—

The words "matters of a merely local or private nature in the province" mean matters the interest or effect of which does not transcend the locality or the private person. If a matter can only affect the particular locality directly or indirectly then it is left to local legislation. If, on the other hand, such private or local matter falls within any of the subjects enumerated in sect. 91, provincial legislation cannot deal with it. Drunkenness affects the whole community, its character, health, and efficiency, more than any other matter; and giving local option does not render the Act which deals with such a matter local in its nature. On the contrary, local option is usually given where the subject is of great general interest, opinion divided as to the change, and large interests threatened thereby. This is the case here. One test whether a matter is "merely" (a restrictive word) local or private is the magnitude of the interests involved, such as temperance, education, public rights, health, &c. Reference was made to the Quebec Resolutions (No. 45), which are referred to in the preamble of the Act of 1867 as the foundation of the Act: see Doutré's Constitution of Canada, Appendix, p. 389. The Regulation No. 45 is given effect to by the words in sect. 91: "Notwithstanding anything in this Act," &c., &c. Reference was then made to *The Queen* v. *Justices of Kings* (3); *The Queen* v. *Taylor* (4); *Cooey* v. *Municipality of the Corporation of Brome* (5); *Hart et la Corporation du Comté de Missisquoi* (6); *Poitras* v. *Corporation of Quebec* (7); *The Queen* v. *Boardman* (*Ontario*) (8). The condition annexed to the legislation involved in

7 *App. Cas.* p. 832.

(1) 2 Russ. & Chesky, Supreme Court Nova Scotia Rep. p. 5.
(2) Law Rep. 6 P. C. 31.
(3) 2 Pugs. 535.
(4) 36 Up. Can. Q. B. Rep. p. 218.
(5) 21 Low. Can Jur. 183.
(6) 2 Quebec L. R. 170.
(7) 9 Rev. Leg. 531.
(8) Doutré's Const. of Canada, p. 320.

giving local option does not imply any delegation of legislative power: *The Queen* v. *Burah* (1).

Further, the case comes within the words "regulation of trade and commerce" in sect. 91, sub-sect. 2. The Act, moreover, is a criminal statute, creating a new offence, the whole tenor being of a criminal nature: see 31 Vict. c. 1 (Interpretation Act), s. 7, sub-sect. 20 (Canada) making this offence a misdemeanour. It is therefore within sect. 91, sub-sect. 27. [SIR JAMES HANNEN:—If the subject-matter be purely provincial could the Dominion Parliament take possession of it by making it criminal?] The following are instances of Acts originally of merely municipal character, but since the British North America Act, 1867, dealt with by Dominion legislation: cf. 32 & 33 Vict. c. 28, c. 27, and c. 22, ss. 25, 26, as respectively affecting 29 & 30 Vict. c. 51 (Canada), s. 284, sub-ss. 8, 9; s. 269, sub-s. 5, and sub-ss. 13, 14.

Brown, replied.

1882
June 23.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from an order of the Supreme Court of the Province of New Brunswick, discharging a rule nisi which had been granted on the application of the Appellant for a certiorari to remove a conviction made by the police magistrate of the city of Fredericton against him, for unlawfully selling intoxicating liquors, contrary to the provisions of the Canada Temperance Act, 1878.

No question has been raised as to the sufficiency of the conviction, supposing the above-mentioned statute is a valid legislative Act of the Parliament of Canada. The only objection made to the conviction in the Supreme Court of New Brunswick, and in the appeal to Her Majesty in Council, is that, having regard to the provisions of the British North America Act, 1867, relating to the distribution of legislative powers, it was not competent for the Parliament of Canada to pass the Act in question.

The Supreme Court of New Brunswick made the order now appealed from in deference to a judgment of the Supreme Court of Canada in the case of the *City of Fredericton* v. *The Queen*. In that case the question of the validity of the Canada Temperance Act, 1878, though in another shape, directly arose, and the Supreme Court of

7 *App. Cas.* p. 833.

(1) 3 App. Cas. 906.

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New Brunswick, consisting of six Judges, then decided, Mr. Justice Palmer dissenting, that the Act was beyond the competency of the Dominion Parliament. On the appeal of the City of Frederickton, this judgment was reversed by the Supreme Court of Canada, which held, Mr. Justice Henry dissenting, that the Act was valid. (The case is reported in 3rd Supreme Court of Canada Reports, p. 505.) The present appeal to Her Majesty is brought, in effect, to review the last-mentioned decision.

The preamble of the Act in question states that "it is very desirable to promote temperance in the dominion, and that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors." The Act is divided into three parts. The first relates to "proceedings for bringing the second part of this Act into force;" the second to "prohibition of traffic in intoxicating liquors;" and the third to "penalties and prosecutions for offences against the second part."

The mode of bringing the second part of the Act into force, stating it succinctly, is as follows: On a petition to the Governor in Council, signed by not less than one fourth in number of the electors of any county or city in the Dominion qualified to vote at the election of a member of the House of Commons, praying that the second part of the Act should be in force and take effect in such county or city, and that the votes of all the electors be taken for or against the adoption of the petition, the Governor-General, after certain prescribed notices and evidence, may issue a proclamation, embodying such petition, with a view to a poll of the electors being taken for or against its adoption. When any petition has been adopted by the electors of the county or city named in it, the Governor-General in Council may, after the expiration of sixty days from the day on which the petition was adopted, by Order in Council published in the *Gazette*, declare that the second part of the Act shall be in force and take effect in such county or city, and the same is then to become of force and take effect accordingly. Such Order in Council is not to be revoked for three years, and only on like petition and procedure.

7 *App. Cas.* p. 834.

The most important of the prohibitory enactments contained in the second part of the Act is s. 99, which enacts that, "from the day on which this part of this Act comes into force and takes effect in any county or city, and for so long thereafter as the same continues in force therein, no person, unless it be for exclusively sacramental or medicinal purposes, or for bonâ fide use in some art, trade, or manufacture, under the regulation contained in the fourth sub-section of this section, or as hereinafter authorized by one of the four next sub-sections of this section, shall, within such county or

city, by himself, his clerk, servant, or agent, expose or keep for sale, or directly or indirectly, on any pretence or upon any device, sell or barter, or in consideration of the purchase of any other property give, to any other person, any spirituous or other intoxicating liquor, or any mixed liquor, capable of being used as a beverage, and part of which is spirituous or otherwise intoxicating."

Sub-sect. 2 provides that "neither any license issued to any distiller or brewer" (and after enumerating other licenses), "nor yet any other description of license whatever, shall in any wise avail to render legal any act done in violation of this section."

Sub-sect. 3 provides for the sale of wine for sacramental purposes, and sub-sect. 4 for the sale of intoxicating liquors for medicinal and manufacturing purposes, these sales being made subject to prescribed conditions.

Other sub-sections provide that producers of cider, and distillers and brewers, may sell liquors of their own manufacture in certain quantities, which may be termed wholesale quantities, or for export, subject to prescribed conditions, and there are provisions of a like nature with respect to vine-growing companies and manufacturers of native wines.

The third part of the Act enacts (sect. 100) that whoever exposes for sale or sells intoxicating liquors in violation of the second part of the Act should be liable, on summary conviction, to a penalty of not less than fifty dollars for the first offence, and not less than one hundred dollars for the second offence, and to be imprisoned for a term not exceeding two months for the third and every subsequent offence; all intoxicating liquors in respect to which any such offence has been committed to be forfeited. 7 *App. Cas.* *p.* 835.

The effect of the Act when brought into force in any county or town within the Dominion is, describing it generally, to prohibit the sale of intoxicating liquors, except in wholesale quantities, or for certain specified purposes, to regulate the traffic in the excepted cases, and to make sales of liquors in violation of the prohibition and regulations contained in the Act criminal offences, punishable by fine, and for the third or subsequent offence by imprisonment.

It was in the first place contended, though not very strongly relied on, by the Appellant's counsel, that assuming the Parliament of Canada had authority to pass a law for prohibiting and regulating the sale of intoxicating liquors, it could not delegate its powers, and that it had done so by delegating the power to bring into force the prohibitory and penal provisions of the Act to a majority of the electors of counties and cities. The short answer to this objection is that the Act does not delegate any legislative powers whatever. It

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contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency. Their Lordships entirely agree with the opinion of Chief Justice Ritchie on this objection. If authority on the point were necessary, it will be found in the case of the *Queen* v. *Burah* (1), lately before this Board.

The general question of the competency of the Dominion Parliament to pass the Act depends on the construction of the 91st and 92nd sections of the British North America Act, 1867, which are found in Part VI. of the statute under the heading, "Distribution of Legislative Powers."

The 91st section enacts, "It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated;" then after the enumeration of twenty-nine classes of subjects, the section contains the following words: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislature of the province."

7 *App. Cas. p.* 836.

The general scheme of the British North America Act with regard to the distribution of legislative powers, and the general scope and effect of sects. 91 and 92, and their relation to each other, were fully considered and commented on by this Board in the case of the *Citizens Insurance Company* v. *Parsons* (2). According to the principle of construction there pointed out, the first question to be determined is, whether the Act now in question falls within any of the classes of subjects enumerated in sect. 92, and assigned exclusively to the Legislatures of the Provinces. If it does, then

(1) 3 App. Cas. 889. (2) 7 App. Cas. 96, *ante*, p. 267.

the further question would arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and so does not still belong to the Dominion Parliament. But if the Act does not fall within any of the classes of subjects in sect. 92, no further question will remain, for it cannot be contended, and indeed was not contended at their Lordships' bar, that, if the Act does not come within one of the classes of subjects assigned to the Provincial Legislatures, the Parliament of Canada had not, by its general power "to make laws for the peace, order, and good government of Canada," full legislative authority to pass it.

Three classes of subjects enumerated in sect. 92 were referred to, under each of which, it was contended by the appellant's counsel, the present legislation fell. These were:—

9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes. 7 *App. Cas.* p. 837.

13. Property and civil rights in the province.

16. Generally all matters of a merely local or private nature in the province.

With regard to the first of these classes, No. 9, it is to be observed that the power of granting licenses is not assigned to the Provincial Legislatures for the purpose of regulating trade, but "in order to the raising of a revenue for provincial, local, or municipal purposes."

The Act in question is not a fiscal law; it is not a law for raising revenue; on the contrary, the effect of it may be to destroy or diminish revenue; indeed it was a main objection to the Act that in the city of Frederickton it did in point of fact diminish the sources of municipal revenue. It is evident, therefore, that the matter of the Act is not within the class of subject No. 9, and consequently that it could not have been passed by the Provincial Legislature by virtue of any authority conferred upon it by that sub-section.

It appears that by statutes of the province of New Brunswick authority has been conferred upon the municipality of Frederickton to raise money for municipal purposes by granting licenses of the nature of those described in No. 9 of sect. 92, and that licenses granted to taverns for the sale of intoxicating liquors were a profitable source of revenue to the municipality. It was contended by the appellant's counsel, and it was their main argument on this part of the case, that the Temperance Act interfered prejudicially with the traffic from which this revenue was derived, and thus invaded a subject assigned exclusively to the Provincial Legislature. But, supposing the effect of the Act to be prejudicial to the revenue derived by the municipality from licenses, it does not follow that the Dominion Parliament might not pass it by virtue of its general

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authority to make laws for the peace, order, and good government of Canada. Assuming that the matter of the Act does not fall within the class of subject described in No. 9, that sub-section can in no way interfere with the general authority of the Parliament to deal with that matter. If the argument of the appellant that the power given to the Provincial Legislatures to raise a revenue by licenses prevents the Dominion Parliament from legislating with regard to any article or commodity which was or might be covered by such licenses were to prevail, the consequence would be that laws which might be necessary for the public good or the public safety could not be enacted at all. Suppose it were deemed to be necessary or expedient for the national safety, or for political reasons, to prohibit the sale of arms, or the carrying of arms, it could not be contended that a Provincial Legislature would have authority, by virtue of sub-sect. 9 (which alone is now under discussion), to pass any such law, nor, if the appellant's argument were to prevail, would the Dominion Parliament be competent to pass it, since such a law would interfere prejudicially with the revenue derived from licenses granted under the authority of the Provincial Legislature for the sale or the carrying of arms. Their Lordships think that the right construction of the enactments does not lead to any such inconvenient consequence. It appears to them that legislation of the kind referred to, though it might interfere with the sale or use of an article included in a license granted under sub-sect. 9, is not in itself legislation upon or within the subject of that sub-section, and consequently is not by reason of it taken out of the general power of the Parliament of the Dominion. It is to be observed that the express provision of the Act in question that no licenses shall avail to render legal any act done in violation of it, is only the expression, inserted probably from abundant caution, of what would be necessarily implied from the legislation itself assuming it to be valid.

7 *App. Cas.* p. 838.

Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects, "Property and Civil Rights." It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things, as well as intoxicating liquors, can, of course, be held as property, but a law placing restrictions on their sale, custody, or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the 92nd section. What Parliament is dealing

with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law (1). Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded. Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada (2). It was said in the course of the judgment of this Board in the case of the *Citizens Insurance Company of Canada* v. *Parsons* (3), that the two sections (91 and 92) must be read together, and the language of one interpreted, and, where necessary, modified by that of the other. Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships,

7 *App. Cas.* p. 839.

7 *App. Cas.* p. 840.

(1) Quo. and Appr. *Hodge* v. *The Queen*, *post*, p. 344.
(2) Quo. and Appr. *Hodge* v. *The Queen*, *post*, p. 343.
(3) 7 App. Cas. 96, *ante*, p. 278.

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for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects "Property and Civil Rights" within the meaning of sub-sect. 13 (1).

It was argued by Mr. Benjamin that if the Act related to criminal law, it was provincial criminal law, and he referred to sub-sect. 15 of sect. 92, viz., "The imposition of any punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section." No doubt this argument would be well founded if the principal matter of the Act could be brought within any of these classes of subjects; but as far as they have yet gone, their Lordships fail to see that this has been done.

It was lastly contended that this Act fell within sub-sect. 16 of sect. 92,—"Generally all matters of a merely local or personal nature in the province."

It was not, of course, contended for the appellant that the Legislature of New Brunswick could have passed the Act in question, which embraces in its enactments all the provinces; nor was it denied, with respect to this last contention, that the Parliament of Canada might have passed an Act of the nature of that under discussion to take effect at the same time throughout the whole Dominion. Their Lordships understand the contention to be that, at least in the absence of a general law of the Parliament of Canada, the provinces might have passed a local law of a like kind, each for its own province, and that, as the prohibitory and penal parts of the Act in question were to come into force in those counties and cities only in which it was adopted in the manner prescribed, or, as it was said, "by local option," the legislation was in effect, and on its face, upon a matter of a merely local nature. The judgment of Allen, C.J., delivered in the Supreme Court of the Province of New Brunswick in the case of *Barker* v. *City of Frederickton* (2), which was adverse to the validity of the Act in question, appears to have been founded upon this view of its enactments. The learned Chief Justice says:—"Had this Act prohibited the sale of liquor, instead of merely restricting and regulating it, I should have had no doubt about the power of the Parliament to pass such an Act; but I think an Act, which in effect authorizes the inhabitants of each town or parish to regulate the sale of liquor, and to direct for whom, for what purposes, and under what conditions spirituous liquors may be sold therein, deals with matters of a merely local nature, which, by the terms of the 16th

7 *App. Cas.* *p.* 841.

(1) Quo. and Appr. *Hodge* v. *The Queen*, *post*, p. 344.
(2) 3 Pugs. & Burb. Sup. Ct. New Br. Rep. 139.

sub-section of sect. 92 of the British North America Act, are within the exclusive control of the local Legislature."

Their Lordships cannot concur in this view. The declared object of Parliament in passing the Act is that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors, with a view to promote temperance in the Dominion. Parliament does not treat the promotion of temperance as desirable in one province more than in another, but as desirable everywhere throughout the Dominion. The Act as soon as it was passed became a law for the whole Dominion, and the enactments of the first part, relating to the machinery for bringing the second part into force, took effect and might be put in motion at once and everywhere within it (1). It is true that the prohibitory and penal parts of the Act are only to come into force in any county or city upon the adoption of a petition to that effect by a majority of electors, but this conditional application of these parts of the Act does not convert the Act itself into legislation in relation to a merely local matter. The objects and scope of the legislation are still general, viz., to promote temperance by means of a uniform law throughout the Dominion.

The manner of bringing the prohibitions and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character. Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it. There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local or exists only in one province, and that Parliament, under colour of general legislation, is dealing with a provincial matter only. It is therefore unnecessary to discuss the considerations which a state of circumstances of this kind might present. The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion, and the local option, as it is called, no more localises the subject and scope of the Act than a provision in an Act for the prevention of contagious diseases in cattle that a public officer should proclaim in what districts it should come in effect, would make the statute itself a mere local law for each of these districts. In statutes of this kind the legislation is general, and the provision for the special application of it to particular places does not alter its character.

7 *App. Cas.* p. 842.

Their Lordships having come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the Provincial Legislatures, it becomes unnecessary to

(1) Expl. *Ontario* v. *Canada*, *post*, p. 498; Disc. *Manitoba* v. *License Holders' Association*, *post*, p. 577.

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discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in sect. 91. In abstaining from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges, who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject, "the regulation of trade and commerce," enumerated in that section, and was, on that ground, a valid exercise of the legislative power of the Parliament of Canada.

In the result, their Lordships will humbly recommend Her Majesty to affirm the judgment of the Supreme Court of Canada, and with costs.

Solicitors for the appellant: *Linklaters, Hackwood, Addison, & Brown.*
Solicitors for the respondent: *Simpson, Hammond, & Co.*

J. C.* 1883 *July*, 5, 6, 18.

ONTARIO *v.* MERCER, 8 APP. CAS. 767.

THE ATTORNEY-GENERAL OF ONTARIO . INFORMANT;

AND

ANDREW F. MERCER . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *ss.* 102, 109—*Escheats—Rights of the Province.*

Held, that lands in Canada escheated to the Crown for defect of heirs belong to the province in which they are situated, and not to the Dominion.

At the date of passing the British North America Act, 1867, the revenue arising from all escheats to the Crown within the then province of Canada was subject to the disposal and appropriation of the Canadian Legislature, and not of the Crown. Although sect. 102 of the Act imposed upon the Dominion the charge of the general public revenue as then existing of the provinces; yet by sect. 109 the casual revenue arising from lands escheated to the Crown after the Union was reserved to the provinces—the words "lands, mines, minerals, and royalties," therein including, according to their true construction, royalties in respect of lands, such as escheats.

Appeal from an order of the Supreme Court of Canada (Nov. 14, 1881) reversing an order of the Court of Appeal for Ontario (March 27, 1880), which unanimously affirmed an order of one of the judges of the Court of Chancery (January, 1879).

On the 28th of September, 1878, the appellant filed an information on behalf of the Crown to recover from the respondent and others

* *Present:*—THE LORD CHANCELLOR (EARL OF SELBORNE), SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

possession of a certain piece of land in the city of Toronto in the province of Ontario, being part of the real estate of Andrew F. Mercer, who died intestate on the 13th of June, 1871, and without leaving any heirs or next of kin. The respondent demurred thereto for want of equity. The first Court held in favour of the appellant that the land had escheated to the Crown for the benefit of the province.

The Dominion Government appealed in the name of the respondent, and it was agreed between the two Governments that the appeal should be limited to the question whether the Government of Canada or that of Ontario was entitled to lands situate in the province of Ontario and escheated to the Crown for want of heirs.

The Supreme Court by a majority (Fournier, Henry, Taschereau, and Gwynne, JJ., Ritchie, C.J., and Strong, J., dissenting) reversed the judgments of the Courts below, and dismissed the information. The reasons stated shortly were that escheat is not a reversionary right but a fiscal prerogative; that the feudal system has never existed in Canada; that the privileges of the provinces were surrendered as a preliminary to the Confederation effected by the British North America Act, 1867; that by that Act all duties and revenues were transferred to the Dominion and to be appropriated to the public service of Canada; and that the Act does not confer on the Government or Legislature of Ontario any right to receive or dispose of the revenue arising from escheated estates situate in the province.

Davey, Q.C., and *Mowat*, Q.C. (Attorney-General of Ontario), with them *Carturright*, of the Canadian bar, and *Raleigh*, for the appellant:—

Lands in the province of Ontario are held in free and common socage. Reference was made to 31 Geo. 3, c. 31, ss. 43, 44. Escheat is a reversionary right incident to such tenure. Such lands belonged to Her Majesty for the benefit of the province before they were granted, and must be taken to revert to the Crown for the benefit of the province on escheat for want of heirs. The Lieut.-Governor of the province, see British North America Act, 1867, sects. 72, 75, acts in the Queen's name, and therefore represents the Queen, notwithstanding that he is appointed by the Governor-General of the Dominion: see also *Théberge* v. *Laudry* (1). For an outline of the legislation shewing how public lands have been dealt with in Canada generally, and how the title thereto has been gradually transferred to the province: see 1 Anne, c. 1, especially s. 8; 39 & 40 Geo. 3, c. 88; 47 Geo. 3, c. 24; 1 Will. 4, c. 25; 1 & 2 Vict. c. 2. See also the Colonial legislation, viz. 7 Will. 4 (Upper Canada), c. 118, and after

8 *App. Cas.* p. 769.

(1) 2 App. Cas. 102.

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the Imperial statute, 3 & 4 Vict. c. 35, for the union of the two Canadas, see especially sects. 50, 51, 54, reference was made to 4 & 5 Vict. c. 100 (Stat. of Canada), and 12 Vict. c. 31, amending it; 9 Vict. (Canada), c. 114, in substance a re-enactment by the provincial legislature of the provisions of the Act of Union (3 & 4 Vict. c. 35), confirmed by 10 & 11 Vict. c. 71, and to 15 & 16 Vict. c. 39 (Imperial).

The question at issue turns on sects. 102 and 109 of the Act of 1867. Escheated lands are within sect. 109. The right by escheat is a species of reversion: see *Burgess* v. *Wheate* (1), and Chitty on the Prerogatives of the Crown, p. 230. [SIR MONTAGUE E. SMITH:—Blackstone puts it under the head of purchase. SIR RICHARD COUCH referred to sect. 637 of the Civil Code of Canada.] Such right, or inchoate right, or possibility of a right, is an interest of the Crown in land within sect. 109. The other side say that the right by escheat is a right to revenue within sect. 102, which has not been transferred to the province. There is no interpretation of "revenues" in the Act. But in sect. 109 the word "royalties" covers escheats. If used in a narrow sense the word would be superfluous, being included in "mines." And as regards the word "lands," all lands ungranted at the time of the Union belonged to the province, and the right to take by escheat is an interest in land which belongs to the same owner who would have had the power to grant. Escheats would also come under the head of "property and civil rights": see sect. 92, cl. 13. When a subject is assigned to the province, any revenue derived from thence is also assigned. Reference was made to *Church* v. *Blake* (2); Chitty on Prerogative, p. 31. The revenues subject to the Dominion under the Act of 1867 are such as are regularly appropriated to the public service, not those which are subject to executive control, and grantable by Her Majesty ex speciali gratiâ, among which are to be reckoned the revenues arising from escheated estates. See 22 Vict. c. 16, ss. 1, 12, and 15.

8 *App. Cas.* p. 770.

The Solicitor-General (Sir *F. Herschell*) and *Lash*, Q.C., of the Canadian bar (*Jeune* with them), for the respondent:—

The appellant has failed to shew affirmatively that escheats in the province belonged to it. It is immaterial whether escheat is a matter of reversion or not: it exists jure coronæ. The law does not recognise a reversion on a grant in fee simple, but a right or prerogative of the Crown under which lands fall to the Crown under certain circumstances. Reference was made to 31 Geo. 3, c. 31, s. 43, and 2 Blackstone, p. 89. That right never belonged to the province, and therefore is unaffected by sect. 109 of the Act of 1867. The fruits of escheats

(1) 1 Eden, 227; 1 W. Bl. 123. (2) 5 Duval, 594.

were always a part of the royal revenue, and in the various statutes which deal with this question escheated lands are always treated as revenue. Those statutes deal with revenue, and not with reversionary or prerogative rights. See 1 Anne, c. 1, s. 5; 39 & 40 Geo. 3, c. 88; 59 Geo. 3, c. 94; 10 Geo. 4, c. 50, s. 126; 1 Wm. 4, c. 25, s. 12; 3 & 4 Vict. c. 35, s. 54; 9 Vict. c. 114, confirmed by 10 & 11 Vict. c. 71; 4 & 5 Vict. c. 100 (Canada), and 12 Vict. c. 31. These last two Acts dealt with public lands, including those which had escheated. "Casual revenues" must include revenues from escheats. See 15 & 16 Vict. (Imperial), c. 39, which ratifies the provisions of the two colonial Acts; for the latter assumed to legislate in regard to lands which might escheat, the only power to do so resulting from the power to deal with casual revenues as given by the Act of Union, s. 54; while Parliament gives a legislative construction to the Act which gives such power. Legislation, therefore, dealt with the fruits of escheats as revenue, and not as an interest in lands; and the Dominion Parliament had the power of appropriation over such revenue. The result of the Act of 1867 was to create certain provinces with certain constitutional rights, new legislatures and new executives. Previously the lieutenant-governor of each province directly represented the Queen. Under the Act the Queen is part of the Dominion Parliament (sect. 17), not of the Ontario Legislature (sect. 69). The Lieutenant-Governor does not now represent the Queen, except where the Act so directs. Reference was made to sects. 92, 109, 117: *Russell* v. *The Queen* (1). The word "lands" does not include escheats after the Act, it includes lands ungranted and lands escheated before the Act. The word "royalties" in sect. 109 is not wide enough to include escheats, and is not a word which would be used for that purpose. Sect. 117 only refers to property actually in use for public purposes. Inasmuch as the fruits of escheats are not expressly given to the separate provinces, they belong to the Dominion.

8 *App. Cas.* p. 771.

Davey, Q.C., replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR (Earl of Selborne):—

The question to be determined in this case is whether lands in the province of Ontario, escheated to the Crown for defect of heirs, "belong" (in the sense in which the verb is used in the British North America Act, 1867), to the province of Ontario or to the Dominion of Canada.

By the Imperial statute 31 Geo. 3, c. 31, s. 43, it was provided

(1) 7 App. Cas. 829, *ante*, p. 310.

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that all lands which should be thereafter granted within the province of Upper Canada (now Ontario), should be granted in free and common socage, in like manner as lands were then holden in free and common socage in England. The argument before their Lordships, on both sides, proceeded upon the assumption that the lands now in question were so holden.

8 *App. Cas.* p. 772.

All land in England, in the hands of any subject, was holden of some lord by some kind of service, and was deemed in law to have been originally derived from the Crown, "and therefore the King was Sovereign Lord, or Lord paramount, either mediate or immediate, of all and every parcel of land within the realm" (Co. Litt. 65a). The King had "dominium directum," the subject "dominium utile" (Ibid. 1a). The word "tenure" signified this relation of tenant to lord. Free or common socage was one of the ancient modes of tenure ("A man may hold of his lord by fealty only, and such tenure is tenure in socage," Litt. sect. 118), which, by the statute 12 Car. 2, c. 24, was substituted throughout England for the former tenures by knight service and by socage in capite of the King, and relieved from various feudal burdens. Some, however, of the former incidents were expressly preserved by that statute, and others (escheat being one of them), though not expressly mentioned, were not taken away.

"'Escheat' is a word of art, and signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated" (Co. Litt. 13a). Elsewhere (Ibid., 92b) it is called "a casual profit," as happening to the lord by "chance and unlooked for." The writ of escheat, when the tenant died without heirs, was in this form:—"The King to the Sheriff, &c. Command A., &c., that he render to B. ten acres of land, with the appurtenances, in N., which C. held of him, and which ought to revert to him, the said B., as his escheat, for that the said C. died without heirs" (F. N. B., 144 F.). If there was a mesne lord, the escheat was to him; if not, to the King.

From the use of the word "revert," in the writ of escheat, is manifestly derived the language of some authorities which speak of escheat as a species of "reversion." There cannot, in the usual and proper sense of the term, be a reversion expectant upon an estate in fee simple. What is meant is that, when there is no longer any tenant, the land returns, by reason of tenure, to the lord by whom, or by whose predecessors in title, the tenure was created. Other writers speak of the lord as taking it by way of succession or inheritance, as if from the tenant, which is certainly not accurate. The tenant's estate (subject to any charges upon it which he may have created) has come to an end, and the lord is in by his own right.

The profits, and the proceeds of sales, of lands escheated to the Crown, were in England part of the casual hereditary revenues of the Crown, and (subject to those powers of disposition which were reserved to the sovereign by the Restraining and Civil List Acts) they were among the hereditary revenues placed at the disposal of Parliament by the Civil List Acts passed at the beginning of the present and the last preceding reign. Those Acts extended, expressly, to all such casual revenues, arising in any of the colonies or foreign possessions of the Crown. But the right of the several Colonial Legislatures to appropriate and deal with them, within their respective territorial limits, was recognised by the Imperial Statute 15 & 16 Vict. c. 39, and by an earlier Imperial Statute (10 & 11 Vict. c. 71), confirming the Canada Civil List Act, passed in 1846 after the Union of Upper and Lower Canada, by which Act the provision made by the Colonial Legislature for the charges of the Royal Government in Canada was accepted and taken, instead of "all territorial and other revenues," then at the disposal of the Crown, arising in that province; over which (as to three-fifths permanently, and as to two-fifths during the life of the Queen, and for five years afterwards) the legislature of the province was to have full power of appropriation. It may be remarked, that the Civil List Acts of the province of Canada contained no reservation of escheats, similar to sect. 12 of each of the Imperial Civil List Acts above referred to. It must have been purposely omitted, in order that escheats might be dealt with by the Government or Legislature of Canada, and not by the Crown, in whose disposition they must have remained if they had not been in that of the United Province of Canada.

8 *App. Cas.* p. 773.

When, therefore, the "British North America Act" of 1867 passed, the revenue arising from all escheats to the Crown, within the then province of Canada, was subject to the disposal and appropriation of the Canadian Legislature.

That Act united into one "Dominion," under the name of "Canada," the former provinces of Canada (which is subdivided into the two new provinces of Ontario and Quebec, corresponding with what had been before 1840 Upper and Lower Canada), Nova Scotia, and New Brunswick. It established a Dominion Government and Legislature, and Provincial Governments and Legislatures, making such a division and apportionment between them of powers, responsibilities, and rights as was thought expedient. In particular, it imposed upon the Dominion the charge of the general public debts of the several pre-existing provinces, and vested in the Dominion (subject to exceptions, on which the present question mainly turns) the general public revenues as then existing of those provinces. This was done by sect.

8 *App. Cas.* p. 774.

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102 of the Act, which is in these words:—"All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick, before and at the Union, had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred upon them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada, in the manner, and subject to the charges, in this Act provided."

If there had been nothing in the Act leading to a contrary conclusion their Lordships might have found it difficult to hold that the word "revenues" in this section did not include territorial as well as other revenues; or that a title in the Dominion to the revenues arising from public lands did not carry with it a right of disposal and appropriation over the lands themselves. Unless, therefore, the casual revenue, arising from lands escheated to the Crown after the Union, is excepted and reserved to the Provincial Legislatures, within the meaning of this section, it would seem to follow that it belongs to the Consolidated Revenue Fund of the Dominion. If it is so excepted and reserved, it falls within sect. 126 of the Act, which provides that "such portions of the duties and revenues, over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union power of appropriation, as are by this Act reserved to the respective governments or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each province form one Consolidated Revenue Fund, to be appropriated for the public service of the province."

8 *App. Cas.* p. 775.

Their Lordships, for the reasons above stated, assume the burden of proving that escheats, subsequent to the Union, are within the sources of revenue excepted and reserved to the provinces, to rest upon the provinces. But, if all ordinary territorial revenues arising within the provinces are so excepted and reserved, it is not à priori probable that this particular kind of casual territorial revenue (not being expressly provided for) would have been, unless by accident and oversight, transferred to the Dominion. The words of the statute must receive their proper construction, whatever that may be; but, if this is doubtful, the more consistent and probable construction ought, in their Lordships' opinion, to be preferred. And it is a circumstance not without weight in the same direction, that while "duties and revenues" only are appropriated to the Dominion, the public property itself, by which territorial revenues are produced (as distinct from the revenues arising from it), is found to be appropriated to the provinces.

The words of exception in sect. 102 refer to revenues of two kinds: (1) such portions of the pre-existing "duties and revenues" as were by the Act "reserved to the respective Legislatures of the provinces;" and (2), such duties and revenues as might be "raised by them, in accordance with the special powers conferred on them by the Act." It is with the former only of these two kinds of revenues that their Lordships are now concerned: the latter being the produce of that power of "direct taxation within the provinces, in order to the raising of a revenue for provincial purposes," which is conferred upon Provincial Legislatures by sect. 92 of the Act.

There is only one clause in the Act by which any sources of revenue appear to be distinctly reserved to the provinces, viz., the 109th section:—"All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick, at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same." The Provincial Legislatures are not, in terms, here mentioned; but the words, "shall belong to the several provinces," are obviously equivalent to those used in sect. 126, "are by this Act reserved to the respective Governments or Legislatures of the Provinces." That they do not apply to all lands held as private property at the time of the Union seems clear from the corresponding language of sect. 125, "No lands or property *belonging to* Canada, or any province, shall be liable to taxation:" where public property only must be intended. They evidently mean lands, &c., which were, at the time of the Union, in some sense, and to some extent, publici juris; and in this respect they receive illustrations from another section, the 117th (which their Lordships do not regard as otherwise very material), "The several provinces shall retain all their respective public property, not otherwise disposed of by this Act, subject to the right of Canada to assume any *lands or public property* required for fortifications, or for the defence of the country."

8 App. Cas. p. 776.

Their Lordships are not satisfied that sect. 102, when it speaks of certain portions of the then existing duties and revenues as "reserved to the respective Legislature of the Provinces," ought to be understood as referring to the powers of provincial legislation conferred by sect. 92. Even, however, if this were so held, the fact that exclusive powers of legislation were given to the provinces as to "the management and sale of the public lands *belonging to* the province," would still leave it necessary to resort to sect. 109 in order to determine

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what those public lands were. The extent of the provincial power of legislation over "property and civil rights in the province" cannot be ascertained without at the same time ascertaining the power and rights of the Dominion under sects. 91 and 102, and therefore cannot throw much light upon the extent of the exceptions and reservations now in question.

It was not disputed, in the argument for the Dominion at the Bar, that all territorial revenues arising within each province from "lands" (in which term must be comprehended all estates in land), which at the time of the Union belonged to the Crown, were reserved to the respective provinces by sect. 109; and it was admitted that no distinction could, in that respect, be made between Crown lands then ungranted and lands which had previously reverted to the Crown by escheat. But it was insisted that a line was drawn at the date of the Union, and that the words were not sufficient to reserve any lands afterwards escheated which at the time of the Union were in private hands and did not then belong to the Crown (1).

8 *App. Cas.* p. 777.

If the word "lands" had stood alone, it might have been difficult to resist the force of this argument. It would have been difficult to say that the right of the lord paramount to future escheats was "land belonging to him," at a time when the fee simple was still in the freeholder. If capable of being described as an interest in land, it was certainly not a present proprietary right to the land itself. The word "lands," however, does not here stand alone. The real question is as to the effect of the words "lands, mines, minerals, and royalties," taken together. In the Court of Appeal of the province of Quebec it has been held that these words are sufficient to pass subsequent escheats; and for this purpose stress was laid by some, at least, of the learned judges of that Court (the others not dissenting) on the particular word "royalties" in this context. If "lands and royalties" only had been mentioned (without "mines" and "minerals") it would have been clear that the right of escheats (whenever they might fall) incident at the time of the Union to the tenure of all socage lands held from the Crown, was a "royalty" then belonging to the Crown within the province, so as to be reserved to the province by this section, and excepted from sect. 102. After full consideration, their Lordships agree with the Quebec Court in thinking that the mention of "mines" and "minerals" in this context is not enough to deprive the word "royalties" of what would, otherwise, have been its proper force (2). It is true (as was observed in some of the opinions of the majority of the Judges in the Supreme Court of Canada), that this

(1) Ref. *St. Catherine's Milling Company* v. *The Queen*, *post*, p. 401.

(2) Ref. *British Columbia* v. *Canada*, *post*, p. 412.

8 *App. Cas. p.* 778.

word "royalties" in mining grants or leases (whether granted by the Crown or by a subject) has often a special sense, signifying that part of the reddendum which is variable, and depends upon the quantity of minerals gotten. It is also true that in Crown grants of land in British North America the practice has generally been to reserve to the Crown, not only royal mines, properly so called, but minerals generally; and that mining grants or leases had before the Union been made by the Crown both in Nova Scotia and in New Brunswick; and that in two Acts of the province of Nova Scotia (one as to coal mines, and the other as to mines and minerals generally) the word "royalties" had been used in its special sense, as applicable to the variable reddenda in mining grants or leases. Another Nova Scotia Act of 1849, surrendering to the Provincial Legislature the territorial and casual revenues of the Crown arising within the province, was also referred to by Mr. Justice Gwynne. But the terms of that Act were very similar to those now under consideration; and if "royalties," in the context which we have here to consider, do not necessarily and solely mean reddenda in mining grants or leases, neither may they in that statute.

It appears, however, to their Lordships to be a fallacy to assume that, because the word "royalties" in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated,—lands as well as mines and minerals, even as to mines and minerals it here necessarily signifies rights belonging to the Crown jure coronæ (1). The general subject of the whole section is of a high political nature; it is the attribution of royal territorial rights, for purposes of revenue and government, to the provinces in which they are situate, or arise. It is a sound maxim of law, that every word ought, primâ facie, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context. In its primary and natural sense "royalties" is merely the English translation or equivalent of "regalitates," "jura regalia," "jura regia." (See, in voce "royalties," Cowell's "Interpreter;" Wharton's Law Lexicon; Tomlins' and Jacobs' Law Dictionaries.) "Regalia" and "regalitates," according to Ducange, are "jura regia"; and Spelman (Gloss. Arch.) says, "Regalia dicuntur jura omnia ad fiscum spectantia." The subject was discussed, with much fullness of learning, in *Dyke* v. *Walford* (2),

(1) Fol. *British Columbia* v. *Canada*, *post*, p. 412.

(2) 5 Moore, P. C. 434.

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8 *App. Cas.* p. 779.

where a Crown grant of jura regalia, belonging to the county palatine of Lancaster, was held to pass the right to bona vacantia. "That it is a jus" (said Mr. Ellis, in his able argument, ibid., p. 480), "is indisputable; it must also be regale; for the Crown holds it generally through England by Royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the Sovereign. It stands on the same footing as the right to escheats, to the land between high and low water mark, to felons' goods, to treasure trove, and other analogous rights." With this statement of the law their Lordships agree, and they consider it to have been, in substance, affirmed by the judgment of Her Majesty in Council in that case.

Their Lordships are not now called upon to decide whether the word "royalties" in sect. 109 of the British North America Act of 1867, extends to other Royal rights besides those connected with "lands," "mines," and "minerals." The question is, whether it ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats, in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense. The larger interpretation (which they regard as, in itself, the more proper and natural) also seems to be that most consistent with the nature and general objects of this particular enactment, which certainly includes all other ordinary territorial revenues of the Crown arising within the respective provinces (1).

The conclusion at which their Lordships have arrived is, that the escheat in question belongs to the province of Ontario, and they will humbly advise Her Majesty that the judgment appealed from ought to be reversed, and that of the Vice-Chancellor and Court of Appeal of Ontario restored. It is some satisfaction to know, that in this result the Courts of Quebec and Ontario have agreed; and, though it differs from the opinion of four Judges, constituting the majority in the Supreme Court of Canada, two of the Judges of that Court, including the Chief Justice, dissented from that opinion.

This being a question of a public nature, the case does not appear to their Lordships to be one for costs.

Solicitors for appellant: *Freshfields & Williams.*
Solicitors for respondent: *Bompas, Bischoff, & Dodgson.*

(1) Fol. *Maritime Bank* v. *Receiver-General*, *post*, p. 420; Fol. *British Columbia* v. *Canada*, *post*, p. 412.

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ARCHIBALD G. HODGE . . . . . APPELLANT;

Nov. 14, 15, 16; *Dec.* 15.

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO, CANADA.

British North America Act, 1867, *ss.* 91, 92—"*Liquor License Act of* 1877, *c.* 181, *Revised Statutes of Ontario*"—*Powers of Local Legislature—Regulations of Local Board—Imprisonment with Hard Labour.*

Subjects which in one aspect and for one purpose fall within sect. 92 of the British North America Act, 1867, may in another aspect and for another purpose fall within sect. 91.

Russell v. *The Queen* (7 App. Cas. 829) explained and approved.

Held, that "The Liquor License Act of 1877, c. 181, Revised Statutes of Ontario," which in respect of sects. 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., does not in respect of those sections interfere with "the general regulation of trade or commerce," but comes within Nos. 8, 15, and 16, of sect. 92 of the Act of 1867, and is within the powers of the provincial legislature.

Held, further, that the local legislature had power by the said Act of 1867 to entrust to a Board of Commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto.

"Imprisonment" in No. 15 of sect. 92 of the Act of 1867 means imprisonment with or without hard labour.

Appeal from a decision of the Court of Appeal (June 30, 1882), allowing the respondent's appeal from a decision of the Court of Queen's Bench (June 25, 1881); by which last-mentioned decision it was ordered that a certain examination made on the 19th day of May, 1881, by and before the police magistrate of the city of Toronto, on the information and complaint of one Thomas Dexter, whereby the appellant was convicted for that he the appellant did on the 7th day of May, 1881, unlawfully permit and suffer a billiard table to be used and a game of billiards to be played thereon, in his tavern in the conviction named and described as the St. James' Hotel, situate within the city of Toronto, during the time prohibited by the "Liquor License Act," (Revised Statutes of Ontario, c. 181)

* *Present:*—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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for the sale of liquor therein, against the form of the resolution of the License Commissioners for the city of Toronto for regulating taverns and shops, passed on the 25th of April, 1881, should be and the same was quashed.

The appellant at the time of the alleged offence was the holder of a liquor license, issued on the 25th of April, 1881, by the Board of License Commissioners for the city of Toronto, under "the Liquor License Act" of the Province of Ontario, in respect of the St. James' Hotel, which license remained in force until the 1st of May, 1882.

The appellant was also then the holder of a license dated the 24th of February, 1881, issued under the authority of the "Municipal Act" (Revised Statutes of Ontario, c. 174, sec. 461), by the corporation of the city of Toronto, authorizing him to carry on the business or calling of a keeper of a billiard saloon with one table for hire, which last-mentioned license remained in force until the 31st of December, 1881.

The facts are stated in the judgment of their Lordships.

Kerr, Q.C. (of the Canadian Bar), and *Jeune*, for the appellant:—

First, the Ontario Assembly is not competent to legislate in regard to licenses for the sale of liquor, and the regulation of licensed houses. The British North America Act, sect. 92, sub-sect. 9, empowers the Provinces to legislate in regard to shop and tavern licenses, but only for the purpose of raising a revenue. Sect. 91, sub-sect. 2, gives the regulation of trade and commerce to the Dominion. In the case of *Russell* v. *The Queen* (1) it was held that the power to prohibit and regulate the traffic belonged to the Dominion. It is very desirable that legislation on this subject should be uniform; and this cannot be secured if each province can pass a licensing law of its own. Second, even if the Ontario Legislature could deal with the subject it could not delegate its powers to License Commissioners. In *The Queen* v. *Burah* (2) it is laid down that a local legislature cannot create a new legislative power not created or authorized by the Imperial Parliament. In this case the local legislature has assigned to three officials the power to define offences and impose penalties. But even if the statutory powers of the Commissioners are intra vires of the legislature, this resolution is not a good exercise of their powers. They assume to regulate billiard tables, which ought to be regulated by the City Council in accordance with Rev. Stat. Ont. c. 174. The resolution is also bad because it places keepers of billiard tables who sell liquor at a disadvantage as compared with those who do not. A by-law

9 *App. Cas.* *p.* 119.

(1) 7 App. Cas. 829, *ante*, p. 310. (2) 3 App. Cas. 905.

discriminating in favour of one class of traders and against another is bad: see *Jonas* v. *Gilbert* (1). See also Cooley on Constitutional Limitations, pp. 201, 503.

[LORD FITZGERALD:—We will take the passages from Cooley as part of your argument but not as authority.]

Lastly, there is no power in the legislature or in the Commissioners to impose the punishment of hard labour. There is a wide difference between simple imprisonment and hard labour: Hawkins' Pleas of the Crown, p. 184; *Easton's Case* (2). The British North America Act, sect. 92, sub-sect. 15, prescribes "fine, penalty or imprisonment," as the punishments to be imposed for breach of provincial laws. The decision in *Frawley's Case* (3) was based on the mistaken assumption that the Provinces surrendered their right into the hands of Parliament at confederation. There was a re-arrangement and transfer of some provincial powers to the Dominion, among others of the power to deal with criminal law, along with which the power to impose hard labour naturally goes. The penalty imposed by the resolution is a fixed penalty, and therefore unreasonable: *Saunders* v. *South Eastern Railway Company* (4).

Davey, Q.C., and *Æmilius Irving*, Q.C. (of the Canadian Bar), (*Raleigh* with them), for the Crown:—

This question must be decided by the rules laid down in *Citizens' Insurance Company of Canada* v. *Parsons* (5). Does the Liquor License Act belong to any of the classes of subjects assigned to the Provinces? The liquor trade, like all other trades, is subject to local regulation for purposes of police. The Commissioners are a "municipal institution" within sub-sect. 8 of sect. 92 of the British North America Act. The regulation of licensed houses is primarily a matter of police; the interference with "trade and commerce" is only incidental. *Russell* v. *The Queen* (6) establishes the right of the Dominion to legislate on the liquor traffic as a matter affecting the peace and good government of Canada. This is not inconsistent with the right of the Provinces to legislate on the same subject for purposes of police. This is recognised in sect. 112 of the Canada Temperance Act itself. Of course if the Province restricts any trade by requiring a license, that must be done bonâ fide for the purpose of raising a revenue. The right to regulate licensed houses is generally recognised in Canada, as appears from the cases collected in Cartwright's Cases on the B. N. A.

9 *App. Cas.* p. 120.

(1) 5 Sup. Ct. Can. 356.
(2) 12 Ad. & E. 645.
(3) 46 U. C. Q. B. 153; 7 App. Rep. 246.
(4) 5 Q. B. D. 462.
(5) 7 App. Cas. 96, *ante*, p. 267.
(6) 7 App. Cas. 829, *ante*, p. 310.

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Act: see *City of Fredericton* v. *The Queen* (1); *In re Slavin and the Corporation of Orillia* (2); *Reg.* v. *Justices of King's County* (3); *Keefe* v. *Maclennan* (4); *Blouin* v. *Corporation of Quebec* (5); *Corporation of Three Rivers* v. *Sulte* (6).

As to the delegation to Commissioners, the maxim Delegatus non potest delegare does not apply to a local legislature: *Reg.* v. *Burah* (7). There is here no delegation of legislative authority—only of the power to make by-laws. The resolution is within the powers of the Commissioners. They do not attempt to regulate billiard tables; it is as liquor licensee not as billiard licensee that the appellant is required to close his billiard saloon. As to the penalties which may be imposed, sect. 59 of the Liquor License Act prescribes fine and imprisonment; sect. 70 adds the powers for enforcing by-laws given to municipal councils by sects. 400–407, and sect. 454 of the Municipal Act, Rev. Stat. Ont. c. 174, and these powers include the imposition of hard labour. By Con. Stat. Can. 1859, c. 99, hard labour could be added to any sentence of imprisonment. That Act is still in force as to offences against provincial laws; as to offences against the criminal law (which is assigned to the Dominion) it has been re-enacted. The term "imprisonment" is very general, and includes imprisonment with hard labour: see Stephen, Digest of Criminal Law, art. 4, which gives the effect of 28 & 29 Vict. c. 126. In construing a conviction, the term "imprisonment" would not be assumed as against the prisoner to mean imprisonment with hard labour. But in construing an instrument of government, such as the B. N. A. Act, a wide construction should be given to the powers of the local legislature: see Vattel, ii., 17, sects. 285–286, cited in the judgment appealed from. The resolution is not open to objection as prescribing a fixed penalty, for by sect. 402 of the Municipal Act (incorporated in the Liquor License Act) the justice may commit "for the term or some part thereof specified in the by-law." They also referred to *Reg.* v. *O'Rourke* (8), and Archbold's Criminal Pleading, 19th ed., p. 56.

9 *App. Cas.* *p.* 121.

Kerr, Q.C., in reply:—

The Provinces have a strictly limited jurisdiction, and though they may amend their constitutions, they may not take more power than Parliament gave them. "Municipal institutions" includes only what was generally included under that head at confederation. In some of

(1) 3 Sup. Ct. Can. 505.
(2) 36 U. C. Q. B. 159.
(3) 2 Pugsley, 535.
(4) 2 Russell & Chesley, 5.
(5) 7 Quebec L. R. 18.
(6) 5 Legal News, 330.
(7) 3 App. Cas. 904.
(8) 1 Ont. Rep. 464; 2 Cart. 644.

the Provinces the legislature had never undertaken to restrict the liquor trade. He referred to *Dobie* v. *Temporalities Board* (1).

The judgment of their Lordships was delivered by

LORD FITZGERALD:—

The appellant, Archibald Hodge, the proprietor of a tavern known as the St. James' Hotel, in the city of Toronto, who, on the 7th of May, 1881, was the holder of a license for the retail of spirituous liquors in his tavern, and also licensed to keep a billiard saloon, was summoned before the police magistrate of Toronto for a breach of the resolutions of the License Commissioners of Toronto, and was convicted on evidence sufficient to sustain the conviction if the magistrate had authority in law to make it. 9 *App. Cas.* p. 122.

The conviction is as follows, viz.:—

"CONVICTION.

"Canada: Province of Ontario, county of York, city of Toronto, to wit:—

"Be it remembered, that on the 19th day of May, in the year of our Lord one thousand eight hundred and eighty-one, at the city of Toronto, in the county of York, Archibald G. Hodge, of the said city, is convicted before me, George Taylor Denison, Esquire, police magistrate in and for the said city of Toronto, for that he, the said Archibald G. Hodge, being a person who, after the passing of the resolution hereinafter mentioned, received, and who, at the time of the committing of the offence hereinafter mentioned, held a license under the Liquor License Act, for and in respect of the tavern known as the St. James' Hotel, situate on York Street, within the city of Toronto, on the seventh day of May in the year aforesaid, at the said city of Toronto, did unlawfully permit, allow, and suffer a billiard table to be used, and a game of billiards to be played thereon in the said tavern, during the time prohibited by the Liquor License Act for the sale of liquor therein, to wit, after the hour of seven o'clock at night on the seventh day of May, being Saturday, against the form of the resolution of the License Commissioners for the city of Toronto for regulating taverns and shops, passed on the twenty-fifth day of April, in the year aforesaid, in such case made and provided.

"Thomas Dexter, of said city, license inspector of the city of Toronto, being the complainant.

(1) 7 App. Cas. 136, *ante*, p. 293.

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"And I adjudge the said Archibald G. Hodge, for his said offence, to forfeit and pay the sum of twenty dollars, to be paid and applied according to law; and also to pay to the said Thomas Dexter the sum of two dollars and eighty-five cents for his costs in this behalf; and if the said several sums be not paid forthwith, then I order that the same be levied by distress and sale of goods and chattels of the said Archibald G. Hodge; and in default of sufficient distress, I adjudge the said Archibald G. Hodge to be imprisoned in the common gaol of the said city of Toronto and county of York, at Toronto, in the county of York, and there be kept at hard labour for the space of fifteen days, unless the said sums, and the costs and charges of conveying the said Archibald G. Hodge to the said gaol, shall be sooner paid."

9 *App. Cas.* *p.* 123.

On the 27th of May, 1881, a rule nisi was obtained to remove that conviction into the Court of Queen's Bench for Ontario, in order that it should be quashed as illegal, on the grounds, 1st, that the said resolution of the said License Commissioners is illegal and unauthorized; 2nd, that the said License Commissioners had no authority to pass the resolution prohibiting the game of billiards as in the said resolution, nor had they power to authorize the imposition of a fine, or, in default of payment thereof, imprisonment for a violation of the said resolution; 3rd, the Liquor License Act, under which the said Commissioners have assumed to pass the said resolution, is beyond the authority of the legislature of Ontario, and does not authorize the said resolution.

It will be observed that the question whether the local legislature could confer the authority on the License Commissioners to make the resolution in question is not directly raised by the rule nisi. On the 27th of June, 1881, that rule was made absolute, and an order pronounced by the Court of Queen's Bench to quash the conviction. The judgment of the Court, which seems to have been unanimous, was delivered by Hagarty, C.J., with elaborate reasons, but finally it will be found that the decision of the Court rests on one ground alone, and does not profess to decide the question which on this appeal was principally discussed before their Lordships. The Chief Justice, in the course of his judgment, says:—

"It was stated to us that the parties desired to present directly to the Court the very important question whether the local legislature, assuming that it had the power themselves to make these regulations and create these offences, and annex penalties for their infraction, could delegate such powers to a board of commissioners or any other authority outside their own legislative body."

And, again, he adds:—

"We are thus brought in face of a very serious question, viz., the power of the Ontario legislature to vest in the License Board the power of creating new offences and annexing penalties for their commission."

9 *App. Cas.* *p.* 124.

And concludes his judgment thus, referring to the resolutions:—

"The legislature has not enacted any of these, but has merely authorized each board in its discretion to make them.

"It seems very difficult, in our judgment, to hold that the Confederation Act gives any such power of delegating authority, first of creating a quasi offence, and then of punishing it by fine or imprisonment.

"We think it is a power that must be exercised by the legislature alone.

"In all these questions of ultra vires the powers of our legislature, we consider it our wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy.

"We, therefore, enter into no general consideration of the powers of the legislature to legislate on this subject; but, assuming this right so to do, we feel constrained to hold that they cannot devolve or delegate these powers to the discretion of a local board of commissioners.

"We think the defendant has the right to say that he has not offended against any law of the Province, and that the convictions cannot be supported."

The case was taken from the Queen's Bench on appeal to the Court of Appeal for Ontario, under the Ontario Act, 44 Vict. c. 27, and on the 30th of June, 1882, that Court reversed the decision of the Queen's Bench, and affirmed the conviction.

Two questions only appear to have been discussed in the Court of Appeal, 1st, that the legislature of Ontario had not authority to enact such regulations as were enacted by the Board of Commissioners, and to create offences and annex penalties for their infraction; and, 2nd, that if the legislature had such authority, it could not delegate it to the Board of Commissioners, or any other authority outside their own legislative body.

9 *App. Cas.* *p.* 125.

This second ground was that on which the judgment of the Court of Queen's Bench rested.

The judgments delivered in the Court of Appeal by Spragge, C.J.,

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and Burton, J.A., are able and elaborate, and were adopted by Patterson and Morrissen, JJ., and their Lordships have derived considerable aid from a careful consideration of the reasons given in both Courts.

The appellant now seeks to reverse the decision of the Court of Appeal, both on the two grounds on which the case was discussed in that Court and on others technical but substantial, and which were urged before this Board with zeal and ability. The main questions arise on an Act of the legislature of Ontario, and on what have been called the resolutions of the License Commissioners.

The Act in question is chapter 181 of the Revised Statutes of Ontario, 1877, and is cited as "the Liquor License Act."

Sect. 3 of this Act provides for the appointment of a Board of License Commissioners for each city, county, union of counties, or electoral district as the Lieutenant Governor may think fit, and sects. 4 and 5 are as follows:—

"Sect. 4. License Commissioners may, at any time before the first day in each year, pass a resolution, or resolutions, for regulating and determining the matters following, that is to say:—

"(1.) For defining the conditions and qualifications requisite to obtain tavern licenses for the retail, within the municipality, of spirituous, fermented, or other manufactured liquors, and also shop licenses for the sale by retail, within the municipality, of such liquors in shops or places other than taverns, inns, ale-houses, beer-houses, or places of public entertainment.

9 *App. Cas.* *p.* 126.

"(2.) For limiting the number of tavern and shop licenses respectively, and for defining the respective times and localities within which, and the persons to whom, such limited number may be issued within the year from the first day of May on one year till the thirtieth day of April inclusive of the next year.

"(3.) For declaring that in cities a number not exceeding ten persons, and in towns a number not exceeding four persons, qualified to have a tavern license, may be exempted from the necessity of having all the tavern accommodation required by law.

"(4.) For regulating the taverns and shops to be licensed.

"(5.) For fixing and defining the duties, powers, and privileges of the inspector of licenses of their district.

"Sect. 5. In and by any such resolution of a Board of License Commissioners the said board may impose penalties for the infraction thereof."

Sect. 43 prohibits the sale of intoxicating liquors from or after the hour of seven of the clock on Saturday till six of the clock on Monday morning thereafter.

Sect. 51 imposes on any person who sells spirituous liquors without the license by law required, or otherwise violates any other provision of the Act, in respect of which violation no other punishment is prescribed, for the first offence a penalty of not less than twenty dollars and not more than fifty dollars, besides costs, and for the second offence imprisonment with hard labour for a period not exceeding three calendar months.

Sect. 52. For punishment of offences against sect. 43 (requiring taverns, &c., to be closed from seven o'clock on Saturday night until six o'clock on Monday morning), a penalty for the first offence of not less than twenty dollars with costs, or fifteen days' imprisonment with hard labour, and with increasing penalties for second, third, and fourth offences; and sect. 70 provides that where the resolution of the License Commissioners imposes a penalty it may be recovered and enforced before a magistrate in the manner and to the extent that by-laws of municipal corporations may be enforced under the authority of the Municipal Act.

9 *App. Cas.* *p.* 127.

License Commissioners were duly appointed under this statute, who, on the 25th of April, 1881, in pursuance of its provisions, made the resolution or regulation now questioned in relation to licensed taverns or shops in the city of Toronto, which contains (inter alia) the following paragraphs, viz.,—

"Nor shall any such licensed person, directly or indirectly as aforesaid, permit, allow, or suffer any bowling alley, billiard or bagatelle table to be used, or any games or amusements of the like description to be played in such tavern or shop, or in or upon any premises connected therewith, during the time prohibited by the Liquor License Act, or by this resolution, for the sale of liquor therein.

"Any person or persons guilty of any infraction of any of the provisions of this resolution shall, upon conviction thereof before the police magistrate of the city of Toronto, forfeit and pay a penalty of twenty dollars and costs; and in default of payment thereof forthwith, the said police magistrate shall issue his warrant to levy the said penalty by distress and sale of the goods and chattels of the

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offender; and in default of sufficient distress in that behalf, the said police magistrate shall by warrant commit the offender to the common gaol of the city of Toronto, with or without hard labour, for the period of fifteen days, unless the said penalty and costs, and all costs of distress and commitment, be sooner paid."

The appellant was the holder of a retail license for his tavern, and had signed an undertaking, as follows:—

"We, the undersigned holders of licenses for taverns and shops in the city of Toronto, respectively acknowledge that we have severally and respectively received a copy of the resolution of the License Commissioners of the city of Toronto to regulate taverns and shops, passed on the 25th day of April last, hereunto annexed, upon the several dates set opposite to our respective signatures hereunder written, and we severally and respectively promise, undertake, and agree to observe and perform the conditions and provisions of such resolution.

"2nd May, Tavern. A. C. Hodge. (L.S.)"

He was also the holder of a billiard license for the city of Toronto to keep a billiard saloon with one table for the year 1881, and, under it, had a billiard table in his tavern.

9 *App. Cas.* p. 128.

He did permit this billiard table to be used as such within the period prohibited by the resolution of the License Commissioners, and it was for that infraction of their rules he was prosecuted and convicted.

The preceding statement of the facts is sufficient to enable their Lordships to determine the questions raised on the appeal.

Mr. Kerr, Q.C., and Mr. Jeune, in their full and very able argument for the appellant, informed their Lordships that the first and principal question in the cause was whether "The Liquor License Act of 1877," in its 4th and 5th sections, was ultra vires of the Ontario legislature, and properly said that it was a matter of importance as between the Dominion Parliament and the legislature of the Province.

Their Lordships do not think it necessary in the present case to lay down any general rule or rules for the construction of the British North America Act. They are impressed with the justice of an observation by Hagarty, C.J., "that in all these questions of ultra vires it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy." They do not forget that in a previous decision on this same statute (*Citizens Insurance Company of Canada* v. *Parsons* (1)) their Lordships recommended that, "in performing the difficult duty of determining such questions, it will be a wise course for those on

(1) 7 App. Cas. 96, *ante*, p. 278.

whom it is thrown to decide each case which arises as best they can, without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular question in hand."

The appellants contended that the legislature of Ontario had no power to pass any Act to regulate the liquor traffic; that the whole power to pass such an Act was conferred on the Dominion Parliament, and consequently taken from the provincial legislature, by sect. 91 of the British North America Act, 1867; and that it did not come within any of the classes of subjects assigned exclusively to the provincial legislatures by sect. 92. The class in sect. 91 which the Liquor License Act, 1877, was said to infringe was No. 2, "The Regulation of Trade and Commerce," and it was urged that the decision of this Board in *Russell* v. *Regina* (1) was conclusive that the whole subject of the liquor traffic was given to the Dominion Parliament, and consequently taken away from the provincial legislature. It appears to their Lordships, however, that the decision of this tribunal in that case has not the effect supposed, and that, when properly considered, it should be taken rather as an authority in support of the judgment of the Court of Appeal. 9 *App. Cas.* p. 129.

The sole question there was, whether it was competent to the Dominion Parliament, under its general powers to make laws for the peace, order, and good government of the Dominion, to pass the Canada Temperance Act, 1878, which was intended to be applicable to the several Provinces of the Dominion, or to such parts of the Provinces as should locally adopt it. It was not doubted that the Dominion Parliament had such authority, under sect. 91, unless the subject fell within some one or more of the classes of subjects, which by sect. 92 were assigned exclusively to the legislatures of the Provinces.

It was in that case contended that the subject of the Temperance Act properly belonged to No. 13 of sect. 92, "Property and Civil Rights in the Province," which it was said belonged exclusively to the provincial legislature, and it was on what seems to be a misapplication of some of the reasons of this Board in observing on that contention that the appellant's counsel principally relied. These observations should be interpreted according to the subject matter to which they were intended to apply.

Their Lordships, in that case, after comparing the Temperance Act with laws relating to the sale of poisons, observe that,—

"Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to

(1) 7 App. Cas. 829, *ante*, p. 310.

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criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada" (1).

And again:—

9 *App. Cas.* p. 130.

"What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law" (2).

And their Lordships' reasons on that part of the case are thus concluded:—

"The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects 'Property and Civil Rights' within the meaning of sub-s. 13" (3).

It appears to their Lordships that *Russell* v. *The Queen* (4), when properly understood, is not an authority in support of the appellant's contention, and their Lordships do not intend to vary or depart from the reasons expressed for their judgment in that case. The principle which that case and the case of the *Citizens Insurance Company* (5) illustrate is, that subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

Their Lordships proceed now to consider the subject matter and legislative character of sects. 4 and 5 of "the Liquor License Act of 1877, cap. 181, Revised Statutes of Ontario." That Act is so far confined in its operation to municipalities in the province of Ontario, and is entirely local in its character and operation. It authorizes the appointment of License Commissioners to act in each municipality, and empowers them to pass, under the name of resolutions, what we know as by-laws, or rules to define the conditions and qualifications requisite for obtaining tavern or shop licenses for sale by retail of spirituous liquors within the municipality; for limiting the number

(1) *Post*, p. 319.
(2) *Post*, p. 319.
(3) *Post*, p. 319.
(4) 7 App. Cas. 829, *post*, p. 310.
(5) 7 App. Cas. 96, *post*, p. 267.

of licenses; for declaring that a limited number of persons qualified to have tavern licenses may be exempted from having all the tavern accommodation required by law, and for regulating licensed taverns and shops, for defining the duties and powers of license inspectors, and to impose penalties for infraction of their resolutions. These seem to be all matters of a merely local nature in the Province, and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments.

9 *App. Cas.* p. 131.

Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted (1).

The subjects of legislation in the Ontario Act of 1877, sects. 4 and 5, seem to come within the heads Nos. 8, 15, and 16 of sect. 92 of British North America Statute, 1867.

Their Lordships are, therefore, of opinion that, in relation to sects. 4 and 5 of the Act in question, the legislature of Ontario acted within the powers conferred on it by the Imperial Act of 1867, and that in this respect there is no conflict with the powers of the Dominion Parliament.

Assuming that the local legislature had power to legislate to the full extent of the resolutions passed by the License Commissioners, and to have enforced the observance of their enactments by penalties and imprisonment with or without hard labour, it was further contended that the Imperial Parliament had conferred no authority on the local legislature to delegate those powers to the License Commissioners, or any other persons. In other words, that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body, and by that body alone. The maxim delegatus non potest delegare was relied on.

9 *App. Cas.* p. 132.

It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the

(1) Expl. *Ontario* v. *Canada*, *post*, p. 494.

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Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow (1). Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide.

Their Lordships do not think it necessary to pursue this subject further, save to add that, if by-laws or resolutions are warranted, power to enforce them seems necessary and equally lawful. Their Lordships have now disposed of the real questions in the cause.

9 *App. Cas.* *p.* 133.

Many other objections were raised on the part of the appellant as to the mode in which the License Commissioners exercised the authority conferred on them, some of which do not appear to have been raised in the Court below, and others were disposed of in the course of the argument, their Lordships being clearly of opinion that the resolutions were merely in the nature of municipal or police regulations in relation to licensed houses, and interfering with liberty of action to the extent only that was necessary to prevent disorder and the abuses of liquor licenses. But it was contended that the

(1) Rrl. *Canada* v. *Cain*, *post*, p. 635; Appr. *Maritime Bank* v. *Receiver-General*, *post*, p. 418.

provincial legislature had no power to impose imprisonment or hard labour for breach of newly created rules or by-laws, and could confer no authority to do so. The argument was principally directed against hard labour. It is not unworthy of observation that this point, as to the power to impose hard labour, was not raised on the rule nisi for the certiorari, nor is it to be found amongst the reasons against the appeal to the Appellate Court in Ontario.

It seems to have been either overlooked or advisedly omitted.

If, as their Lordships have decided, the subjects of legislation come within the powers of the provincial legislature, then No. 15 of sect. 92 of the British North America Act, which provides for "the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section," is applicable to the case before us, and is not in conflict with No. 27 of sect. 91; under these very general terms, "the imposition of punishment by imprisonment for enforcing any law," it seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it,—"hard labour"; in other words, that "imprisonment" there means restraint by confinement in a prison, with or without its usual accompaniment, "hard labour."

The provincial legislature having thus the authority to impose imprisonment, with or without hard labour, had also power to delegate similar authority to the municipal body which it created, called the License Commissioners. 9 *App. Cas.* *p.* 134.

It is said, however, that the legislature did not delegate such powers to the License Commissioners, and that therefore the resolution imposing hard labour is void for excess. It seems to their Lordships that this objection is not well founded.

In the first place, by sect. 5 of the Liquor License Act, the Commissioners may impose penalties. Whether the word "penalty" is well adapted to include imprisonment may be questioned, but in this Act it is so used, for sect. 52 imposes on offenders against the provisions of sect. 43 a penalty of twenty dollars or fifteen days' imprisonment, and for a fourth offence a penalty of imprisonment with hard labour only. "Penalty" here seems to be used in its wider sense as equivalent to punishment. It is observable that in sect. 59, where recovery of penalties is dealt with, the Act speaks of "penalties in money." But, supposing that the "penalty" is to be confined to pecuniary penalties, those penalties may, by sect. 70, be recovered and enforced in the manner, and to the extent, that by-laws of municipal councils may be enforced under the authority of the

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Municipal Act. The word "recover" is an apt word for pecuniary remedies, and the word "enforce" for remedies against the person.

Turning to the Municipal Act, we find that, by sect. 454, municipal councils may pass by-laws for inflicting reasonable fines and penalties for the breach of any by-laws, and for inflicting reasonable punishment by imprisonment, with or without hard labour, for the breach of any by-laws in case the fine cannot be recovered. By sects. 400 to 402 it is provided that fines and penalties may be recovered and enforced by summary conviction before a justice of the peace, and that, where the prosecution is for an offence against a municipal by-law, the justice may award the whole or such part of the penalty or punishment imposed by the by-law as he thinks fit; and that, if there is no distress found out of which a pecuniary penalty can be levied, the justice may commit the offender to prison for the term, or some part thereof, specified in the by-law. If these by-laws are to be enforced at all by fine or imprisonment, it is necessary that they should specify some amount of fine and some term of imprisonment.

9 *App. Cas.* *p.* 135.

The Liquor License Act then gives to the Commissioners either power to impose a penalty against the person directly, or power to impose a money penalty, which, when imposed, may be enforced according to sects. 454 and 400–2 of the Municipal Act. In either case, the Municipal Act must be read to find the manner of enforcing the penalty, and the extent to which it may be enforced. The most reasonable way of construing statutes so framed is to read into the later one the passages of the former which are referred to. So reading these two statutes, the Commissioners have the same power of enforcing the penalties they impose as the Councils have of enforcing their by-laws, whether they can impose penalties against the person directly, or only indirectly as the means of enforcing money penalties. In either case, their resolution must, in order to give the magistrate jurisdiction, specify the amount of punishment. In either case, their resolution now under discussion is altogether within the powers conferred upon them.

Their Lordships do not think it necessary or useful to advert to some minor points of discussion, and are, on the whole, of opinion that the decision of the Court of Appeal of Ontario should be affirmed, and this appeal dismissed, with costs, and will so humbly advise Her Majesty.

Solicitors for appellant: *Bompas, Bischoff, & Dodgson.*
Solicitors for respondent: *Freshfields & Williams.*

COLONIAL BUILDING ASSOCIATION *v.* QUEBEC, 9 APP. CAS. 157.

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Nov. 6, 7;
Dec. 1.

THE COLONIAL BUILDING AND INVESTMENT ASSOCIATION . . . . . } DEFENDANTS;

AND

THE ATTORNEY-GENERAL OF QUEBEC . PLAINTIFF.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, LOWER CANADA.

British North America Act, 1867, *ss.* 91, 92—*Canadian Act*, 37 *Vict. c.* 103—*Powers of Dominion Parliament.*

Held, that Canadian Act 37 Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the Dominion was within the legislative competence of the Dominion Parliament. The fact that the corporation chose to confine the exercise of its powers to one province and to local and provincial objects did not affect its status as a corporation, or operate to render its original incorporation illegal as ultra vires of the said Parliament.

Held, further, that the corporation could not be prohibited generally from acting as such within the province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed and adapted to that purpose.

Appeal from a judgment of the Court of Queen's Bench (March 24, 1882) reversing a judgment of the Superior Court (July 9, 1881) in favour of the appellants in the matter of a petition by the respondent for a declaration that the appellants' association had been and was illegally formed and incorporated, and for an order dissolving the said association, and prohibiting the appellants from acting in future as such corporation.

The proceedings out of which this appeal arose were instituted by the Attorney-General for Quebec, under art. 997 and following articles of the Code of Civil Procedure for Lower Canada. They were commenced by a petition in the nature of an information filed the 1st of April, 1881, followed by an answer on the 7th of April, 1881. The association was incorporated by the Canadian Act 37 Vict. c. 103. The pleadings, the Act, and the provisions of the Civil Procedure Code on which the proceedings were based, sufficiently appear in the judgment of their Lordships.

* *Present:*—LORD FITZGERALD, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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COLONIAL BUILDING AND INVESTMENT ASSOCIATION v. ATTORNEY-GENERAL OF QUEBEC.

On the 24th of March, 1882, the Court of Queen's Bench (Dorion, C.J., Tessier, Cross, and Baby, JJ.) delivered judgment (Monk, J., dissentiente), reversing the judgment of the Superior Court, which had dismissed the petition and quashed the writ, and instead thereof adjudged and declared that the defendant company had and has no right to act as a corporation for or in respect of any of the operations of buying, leasing, or selling of landed property, buildings, and appurtenances thereof; or the purchase of building materials to construct villas, homesteads, cottages, or other buildings and premises, or the selling, or letting of the same; or the establishment of a building or subscription fund for investment or building purposes; or the acting as agents in connection with such operations as the aforesaid, or any like affairs, or any matter of property, or civil rights, or any objects of a purely local or provincial nature, in any manner or way within the said Province of Quebec; and prohibited the said company from acting as a corporation within the Province of Quebec for any of the ends or purposes aforesaid; and further condemned the company to pay the plaintiff the costs as well of the Court below as of the appeal.

Matthews, Q.C., and *Fullarton*, for the appellant, said that the three main questions were, first, whether the company was legally incorporated; secondly, whether it is entitled to hold lands in Quebec, having regard to the local law of mortmain; thirdly, whether the judgment is founded on the petition. As regards the first, see British North America Act, 1867, ss. 91, 92; *Citizens' Assurance Company* v. *Parsons* (1); a company like this could not be incorporated by any provincial legislature. As regards the second, this trading corporation would not under the old French law have come within the definition of main morte. The Civil Code of Lower Canada, arts. 364, 366, made a difference, see *The Chaudière Gold Mining Company* v. *Desbarats* (2). There are certain Building Acts of the provincial legislature which are said to be violated by this company; but it is not a building association within the meaning of those Acts. It is admitted that the appellant company may not acquire land contrary to the provisions of any local law; but it is contended that no such illegal acquisition is shewn, and if shewn would not support the prayer of the petition. As regards the third point, the declaration and prohibition pronounced by the Court are not those asked for by the petition. They are not founded on the process before the Court, and not relevant to the issues of law and fact raised by the pleadings. The provisions of the Procedure

(1) 7 App. Cas. 96, *ante*, p. 267.

(2) Law Rep. 5 P. C. 277.

7 App. Cas. p. 159.

Code applicable to these proceedings shew that their validity and the jurisdiction of the Court therein depend upon and are limited by the information and the conclusions thereof; and that the issues to be tried and the proof to be adduced are similarly limited: see sects. 997, 998 (amended by Quebec Act, 35 Vict. c. 6, s. 21), 999, 1114, 1115.

Gibbs, Q.C., and *Boddam* (*Girouard*, Q.C., of the Canadian Bar with them), for the respondent, contended that the appellant company could do all it wanted provided it obtained the consent of the local legislatures: see Civil Code, s. 358. Not having done so its acts are illegal, that is, in violation of the local laws. The company is not illegally incorporated—its powers are only incapable of being exercised at present, this can be remedied. [SIR MONTAGUE E. SMITH:—The Attorney-General was bound to lay distinct grounds; having charged illegal incorporation, can you convert that into a totally distinct charge?] Reference was made to sects. 4 and 33 of the Act under discussion. The words in the petition "without being legally incorporated or recognised" are sufficient to challenge illegality other than that of incorporation: see sect. 997 of Civil Code Procedure. [SIR BARNES PEACOCK:—The Court cannot in a proceeding like this give an injunction; it can only do one of two things under sect. 1007 and sect. 1008.] Those sections must be read with sect. 997. The object of the Act is to create a building society for provincial purposes, and those purposes cannot be effected without the aid of the provincial legislature, and in contravention of the Building Acts of the province.

9 *App. Cas.* *p.* 160.

The counsel for the appellants were not called upon to reply.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from a judgment of the Court of Queen's Bench of the Province of Quebec, reversing a judgment of the Superior Court, which dismissed the petition of the Attorney-General of the province, praying that it be declared that the appellant company had been illegally incorporated, and that it be ordered to be dissolved, and prohibited from acting as a corporation.

The judgment now appealed from did not grant the prayer of the petition, but gave other relief, in the manner to be hereafter adverted to.

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COLONIAL BUILDING AND INVESTMENT ASSOCIATION v. ATTORNEY-GENERAL OF QUEBEC.

The Colonial Building and Investment Association was incorporated by an Act of the Parliament of Canada (37 Vict. c. 103).

The preamble states—

"That the persons thereinafter named, 'owners of real estate in the city and district of Montreal, and elsewhere in the Dominion, have petitioned for an Act of Incorporation, to establish an association to be called the Colonial Building and Investment Association, whereby powers may be conferred on the said association for the purpose of buying, leasing, or selling landed property, buildings, and appurtenances thereof; for the purchase of building materials, to construct an improved class of villas, homesteads, cottages, and other buildings and premises, and to sell or let the same; and for the purpose of establishing a building or subscription fund, to which persons may subscribe or pay in money for investment or for building purposes, and from which payments may be made for said purposes; and also to act as an agency.'

"Sect. 1 incorporates the association.

"Sect. 4 enacts that the association shall have power to acquire and hold, by purchase, lease, or other legal title, any real estate necessary for the carrying out of its undertakings; to construct and maintain houses or other buildings; to let, sell, convey, and dispose of the said property; to acquire and use or dispose of every description of materials for building purposes; to lend money on security, by mortgage on real estate, or on Dominion or Provincial Government securities, or on the stocks of chartered banks in the Dominion; and to acquire, hold, and dispose of public securities, stocks, bonds, or debentures of any corporate bodies, and other defined securities. The clause provides that the association shall sell the property so acquired within five years from the date of the purchase thereof.

9 *App. Cas.* p. 161.

"Sect. 5 enables the association to act as an agency and trust company.

"Sect. 11 provides that the chief office of the association shall be in the city of Montreal, and that branch offices or agencies may be established in London, England, in New York, in the United States of America, and in any city or town in the Dominion of Canada, for such purposes as the directors may determine, in accordance with the Act; and that bonds, coupons, dividends, or other payments of the association may be made payable at any of the said offices or agencies."

The secretary of the association, the only witness called in support of the petition, proved that the association had bought lands, erected

houses on such lands, and sold them, and had also built houses on the lands of others, and lent money on real estate. He stated that these operations had hitherto been confined to the province of Quebec, though efforts had been made to extend the business of the company to other provinces, and to establish agencies in Glasgow and New York, which had failed in consequence of the inability of the association to raise sufficient capital.

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In order to understand the question which ultimately became the principal one to be considered in this appeal, viz., whether the judgment of the Court of Queen's Bench is properly founded upon the Attorney-General's petition, it is necessary to refer to the provisions of the Code of Civil Procedure of Lower Canada on which the proceedings are based, the scope and prayer of the petition, and the nature and form of the judgment appealed from.

The heading of chapter 10, sect. 1, of the Code is, "Of corporations illegally formed, or violating or exceeding their powers."

Art. 997 is as follows:—

"In the following cases,—

9 *App. Cas.* p. 162.

"(1.) Whenever any association or number of persons acts as a corporation without being legally incorporated or recognised;

"(2.) Whenever any corporation, public body, or board, violates any of the provisions of the Acts by which it is governed, or becomes liable to a forfeiture of its rights, or does or omits to do acts the doing or omission of which amounts to a surrender of its corporate rights, privileges, and franchises, or exercises any power, franchise, or privilege which does not belong to it, or is not conferred upon it by law, it is the duty of Her Majesty's Attorney-General for Lower Canada to prosecute in Her Majesty's name such violations of the law whenever he has good reason to believe that such facts can be established by proof in every case of public general interest, but he is not bound to do so in any other case unless sufficient security is given to indemnify the Government against all costs to be incurred upon such proceeding; and in such case the special information must mention the names of the person who has solicited the Attorney-General to take such legal proceedings, and of the person who has become security for costs."

Art. 998 (as amended) reads:—

"The summons for that purpose must be preceded by the presenting to the Superior Court, or to a judge, of a special information containing conclusions adapted to the nature of the contravention, and supported by an affidavit to the satisfaction of the Court or judge,

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and the writ of summons cannot issue upon such information without the authorization of the Court or judge."

COLONIAL BUILDING AND INVESTMENT ASSOCIATION *v.* ATTORNEY-GENERAL OF QUEBEC.

The material allegations of the petition filed by the Attorney-General are the following :—

"That the 'Colonial Building and Investment Association' for years past have been and still are acting as a corporation in the city of Montreal, and elsewhere, in the Province of Quebec exclusively, and as such, ever since the date of its existence hereinafter mentioned, have been buying, leasing, and selling landed property, buildings, and appurtenances thereto, constructing villas, homesteads, cottages, and other buildings, and selling and letting the same, and have also been lending money on security by mortgage or hypothec on real estate in this province, the whole without being legally incorporated or recognised.

9 *App. Cas.* *p.* 163.

"That the operations and business of the said association have been limited to the Province of Quebec, and being, moreover, of a merely local or private nature in the said province, and having provincial objects affecting property and civil rights in the said province, the said association could not lawfully be incorporated except by or under the authority of the legislature of the Province of Quebec.

"That the said association was incorporated by the Parliament of Canada in the year 1874, 37 Vict. c. 103, and has ever since been in operation under the said Act of incorporation, which, for reasons above alleged, is null and void and of no effect, the said Act of incorporation being ultra vires.

"Wherefore your petitioner prays that a writ of summons upon the affidavit hereto annexed be ordered to issue in due course of law, and that the said defendants be adjudged and declared to have been and to be illegally formed and incorporated, and that the said illegal association may be ordered to be dissolved, and be declared dissolved, and, finally, that the defendants be prohibited from acting in future as such corporation, the whole with costs distraits to the undersigned attorneys."

The petition was verified by affidavit, as required by the Code, and thereupon an order for a writ of summons against the company was issued by a judge.

The petition also alleges that it was presented at the solicitation of John Fletcher, a shareholder of the company, who had become security for costs. It appears that Fletcher was in default in payment of his calls, but in the view their Lordships take of the case any further reference to this relator becomes immaterial.

The broad objection taken by the Attorney-General in the petition is, that the association was not legally incorporated, the statute incorporating it being ultra vires of the Parliament of the Dominion.

The judgment of the Superior Court, given by Mr. Justice Caron, distinctly overruled this objection. Mr. Justice Tessier is the only Judge of the Court of Queen's Bench who affirmed it. Chief Justice Dorion, in a judgment which received the concurrence of two other judges, acknowledged that having regard to the observations of this Board in the case of the *Citizens Insurance Company of Canada* v. *Parsons* (1), it could not be held that the incorporation of the association was beyond the powers of the Dominion Parliament, and illegal; and the majority of the Court gave judgment upon the assumption, as their Lordships understand the reasons of the judges, that the association was lawfully incorporated. The conclusion of the formal judgment of the Court is as follows:—

9 *App. Cas.* p. 161.

"That the said company, respondents, had and have no right to act as a corporation for or in respect of any of the said operations of buying, leasing, or selling of landed property, buildings, and appurtenances thereof, or the purchase of building materials to construct villas, homesteads, cottages, or other buildings and premises, or the selling or letting of the same, or the establishment of a building or subscription fund for investment or building purposes, or the acting as agents in connection with such operations as the aforesaid, or any like affairs, or any matter of property or civil rights, or any objects of a purely local or provincial nature, in any manner or way within the said Province of Quebec, and doth prohibit the said company, respondents, from acting as a corporation within the said Province of Quebec for any of the ends or the purposes aforesaid."

Mr. Justice Monk, in a short but clear judgment, dissented from his colleagues, and agreed with Mr. Justice Caron's judgment.

Their Lordships cannot doubt that the majority of the Court was right in refusing to hold that the association was not lawfully incorporated. Although the observations of this Board in the *Citizens Insurance Company of Canada* v. *Parsons* (1), referred to by the Chief Justice, put a hypothetical case by way of illustration only, and cannot be regarded as a decision on the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of companies.

9 *App. Cas.* p. 165.

It is asserted in the petition, and was argued in the Courts below, and at this bar, that inasmuch as the association had confined its

(1) 7 App. Cas. 96, *ante*, p. 282.

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operations to the Province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and consequently that its incorporation belonged exclusively to the Provincial Legislature. But surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the association was originally within the legislative power of the Dominion Parliament (1). The company was incorporated with powers to carry on its business consisting of various kinds throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of Incorporation, nor warrant the judgment prayed for, viz., that the company be declared to be illegally constituted.

It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object, for the only evidence given in the case discloses no ground for suggesting fraud in obtaining the Act.

Their Lordships therefore think that the Courts in Canada were right in holding that it was not competent to them to declare, in accordance with the prayer of the petition, that the association was illegally incorporated, and ought to be dissolved.

There remains the question, which was mainly argued at the bar, whether the judgment of the Court of Queen's Bench which, shortly stated, declares that the association has no right to act as a corporation in respect of its most important operations within the Province of Quebec, and prohibiting it from so acting within the province, can be sustained.

9 *App. Cas.* p. 166.

It was not disputed by the counsel for the Attorney-General that, on the assumption that the corporation was duly constituted, the prohibition was too wide, and embraced some matters which might be lawfully done in the province, but it was urged that the operations of the company contravened the provincial law, at the least, in two respects, viz., in dealing in land, and in acting in contravention of the Building Acts of the province.

It may be granted that, by the law of Quebec, corporations cannot acquire or hold lands without the consent of the Crown. This law was recognised by this Board, and held to apply to foreign corporations in the case of the *Chaudière Gold Mining Company* v. *Desbarats* (2). It may also be assumed, for the purpose of this appeal, that the

(1) Appr. *Toronto* v. *Bell Telephone Company*, *post*, p. 622.

(2) Law Rep. 5 P. C. 277.

power to repeal or modify this law falls within No. 13 of sect. 92 of the British North America Act, viz., "Property and Civil Rights within the Province," and belongs exclusively to the Provincial Legislature; so that the Dominion Parliament could not confer powers on the company to override it. But the powers found in the Act of Incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the Crown. If that consent be obtained, a corporation does not infringe the provincial law of mortmain by acquiring and holding lands. What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz., throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of Incorporation gives it capacity to do so.

It is said, however, that the company has, in fact, violated the law of the province by acquiring and holding land without having obtained the consent of the Crown. It may be so, but this is not the case made by the petition. Proceedings founded on the alleged violation by a corporation of the mortmain laws would involve an inquiry opening questions (some of which were touched upon in the arguments at the bar) regarding the scope and effect of these laws, the fact of the Crown's consent, the nature and sufficiency of the evidence of it, the consequences of a violation of the laws, and the proper parties to take advantage of it; questions which are certainly not raised by the allegations and conclusions of this petition.

9 *App. Cas.* p. 167.

So with respect to the objections founded on the Acts of the province with regard to building societies. Chief Justice Dorion appears to be of opinion that, inasmuch as the legislature of the province had passed Acts relating to such societies, and defined and limited their operations, the Dominion Parliament was incompetent to incorporate the present association, having for one of its objects the erection of buildings throughout the Dominion. Their Lordships, at present, fail to see how the existence of these Provincial Acts, if competently passed for local objects, can interfere with the power of the Dominion Parliament to incorporate the association in question.

If the association by its operations has really infringed the Pro-

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vincial Building Societies Acts, a proper remedy may doubtless be found, adapted to such a violation of the provincial law; but, as their Lordships have just observed with reference to the supposed contravention of the Mortmain Acts, that is not the case made by the petition.

It now becomes material to examine more closely than has hitherto been done the allegations and conclusions the petition really contains. The first paragraph, after stating that the corporation carried on its operations in Quebec exclusively, concludes thus: "the whole without being legally incorporated or recognised."

The second paragraph avers that the operations of the company being confined to Quebec, and being of a merely local nature, affecting property and civil rights in the province, "could not lawfully be incorporated except by the authority of the legislature of the province."

The third paragraph alleges that for these reasons, "the Act of Incorporation is null and void, the said Act of Incorporation being ultra vires."

9 *App. Cas.* *p.* 168.

The conclusion and prayer based on these allegations are, that the association be declared to be illegally incorporated, be declared dissolved, and prohibited from acting in future as a corporation.

It seems to their Lordships it would be a violation not only of the ordinary rules of procedure, but of fair trial, to decide this appeal upon a new case, which, assuming a lawful incorporation, rests on the supposed infringement of the laws of the province by the company in conducting its operations. This is not the wrong struck at by the petition, but a wrongdoing raising issues of a wholly different character to those to which the allegations and conclusions of the petition are alone directed and adapted. It is to be observed that the inquiries made of the company's secretary were of a general nature, and mainly directed to support the allegation in the petition that the company's operations had been limited to the Province of Quebec. No investigation of the title to any of the lands it held, nor of any particular transaction, was gone into at the hearing.

The 998th article of the Code of Civil Procedure requires that the summons to be issued "must" be preceded by a petition to the Court containing "conclusions adapted to the nature of the contravention," to be supported by an affidavit; and provides that the summons cannot be issued upon such information without the authority of a Judge. It is quite plain that the conclusions of this petition are not adapted to the case now relied on by the Attorney-General; so that neither the general principle regulating procedure nor the

special requirements of the Code allow of its being set up on these proceedings.

If the company is really holding property in Quebec without having complied with the law of that province, or is otherwise violating the provincial law, there may be found proceedings applicable to such violations; though it is not for their Lordships to anticipate them, or to indicate their form.

It should be observed that their Lordships, in the case supposed in their judgment in the appeal of the Citizens Insurance Company, in regard to corporations created by the Dominion Parliament with power to hold land being subject to the law of mortmain existing in any province in which they sought to acquire it, had not in view the special law of any one province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent. The object was merely to point out that a corporation could only exercise its powers subject to the law of the province, whatever it might be, in this respect.

9 *App. Cas.* p. 169.

It was argued that the judgment of the Court of Queen's Bench might be sustained by the part of the prayer which asked that the company "be prohibited from acting in future as a corporation within the Province of Quebec" for certain purposes. But the prohibition is asked as consequential upon the declarations prayed for, and when these are refused, there are not only no declarations, but no allegations in the petition to sustain it. It has been seen that the prohibition contained in the judgment of the Court of Queen's Bench is not an injunction limited to restraining the company from doing specified acts in violation of particular laws of the province, but is a general prohibition founded on a declaration introduced by the Court, other than those prayed for, that the company has no right to act as a corporation in dealing with lands and buildings, and certain other matters within the province. This declaration, with the prohibition founded on it, is obviously too extensive. A prohibition in these wide and sweeping terms would prohibit the company from acquiring or dealing in lands, though it had the Crown's consent, and could only be warranted by affirming the invalidity of the Act of Incorporation, which would be opposed to what has been stated in the previous part of this judgment to be their Lordships' view; or at least by affirming that the company, in exercising its powers in the province, must necessarily violate the provincial law, which, as already shewn, is not a necessary consequence.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment under appeal, and to order that the judgment

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of the Superior Court be affirmed, and that the present appellant's costs of the appeal to the Court of Queen's Bench in Canada be paid by the present respondent. The appellant must also have the costs of the appeal to Her Majesty.

Solicitors for Appellants: *Simpson, Hammond, & Co.*
Solicitors for Respondent: *Wilde, Berger, & Moore.*

J. C.* 1884
Nov. 26.

QUEBEC *v.* REED, 10 APP. CAS. 141.

THE ATTORNEY-GENERAL FOR QUEBEC . APPELLANT;

AND

WALTER REED . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *ss.* 65, 92, *sub-ss.* 2, 14—*Quebec Act*, 43 & 44 *Vict. c.* 9—*Powers of Provincial Legislature—Duty upon Exhibits.*

Held, that Quebec Act (43 & 44 Vict. c. 9) which imposed a duty of ten cents upon every exhibit filed in Court in any action depending therein is ultrà vires of the provincial legislature.

Appeal from an order of the Supreme Court (June 18, 1883), reversing a judgment of the Court of Queen's Bench of Quebec (Nov. 24, 1882), and restoring a judgment of the Superior Court of Quebec, district of Montreal (March 10, 1882).

The order declared that a certain duty of ten cents imposed by an Act of the Quebec legislature (43 & 44 Vict. c. 9) on every exhibit produced in Court in any action depending therein was not warranted by law, the Act imposing it being *ultrà vires* of the provincial legislature.

The question arose in an action depending in the said Superior Court, wherein the respondent tendered a promissory note as an exhibit, and the prothonotary refused to receive and file it unless there were affixed to it a law stamp of ten cents in payment of the duty imposed by the said Act. A rule was thereupon obtained by the Respondent and served by order of the Court upon the Appellant to shew cause why the exhibit should not be received without a stamp; with the result as stated above. The judgment

* *Present*:—THE LORD CHANCELLOR (EARL OF SELBORNE), LORD FITZGERALD, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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of the Supreme Court was pronounced by a majority of the Judges (Ritchie, C.J., Fournier, Henry, and Gwynne, JJ., Strong and Taschereau, JJ., dissenting).

Davey, Q.C., and *Glokensky*, Q.C. (of the Canadian bar), *Pollard* with them, for the appellant, contended that the Act in question was within the competence of the provincial legislature. It was passed several years ago, duly received the assent prescribed by the imperial Act in lieu of the former royal assent to Acts of the former province, was never disallowed, and was acted upon. The duty imposed was not a fresh one, but was identical with the duty of ten cents upon exhibits imposed by the Act 39 Vict. c. 8, which was only repealed and re-enacted by the Act in question. Its validity appears from the following considerations: (a) as imposing "direct taxation" in pursuance of the express power given to the provincial legislatures by the British North America Act, 1867, sect. 92, sub-s. 2; (b) as relating to the administration of justice in the provinces under sub-s. 14 of the same section within the meaning of the words there employed; (c) as being under the provisions of sects. 65 and 129 an alteration of a law in force in the former province of Canada at the union of the provinces into the dominion by the said Act of 1867. In reference to this last reason for the validity of the Act it was contended that up to and at the union Consol. Stat. of Lower Canada, c. 109, s. 32, gave power to the Governor to impose any duty on exhibits in any Court in Lower Canada by Order in Council; that sect. 65 of the Act of 1867 (compare also sect. 129) made such power exerciseable by the Lieutenant-Governor of the province, subject to the legislature of the province; that therefore Quebec Act, 39 Vict. c. 8, sects. 1 and 2, was within the competence of the provincial legislature; and that consequently the Act in question, as a mere amendment or re-enactment of 39 Vict. c. 8, was equally within that competence. 10 *App. Cas.* p. 142.

The respondent did not appear.

The judgment of their Lordships was delivered by

EARL OF SELBORNE, L.C.:—

Their Lordships have considered the argument which they have heard, and they have come to the conclusion that the judgment appealed from must be affirmed.

The points to be considered are three; first of all, can this charge upon exhibits used in the courts of justice of the province be justified under the 2nd sub-section of clause 92 of the British North 10 *App. Cas.* p. 143.

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America Act? Is it a case of direct taxation within the province "in order to the raising of a revenue for provincial purposes?" What is the meaning of the words "direct taxation"?

Now it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill, and those who agree with him, is less unfavourable to the Appellant's arguments than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the ultimate incidence of the taxation as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are printed here from Mr. Mill's book on political economy—"one which is demanded from the very persons who it is intended or desired should pay it." And then the converse definition of indirect taxes is, "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." (1)

Well now, taking the first part of that definition, can it be said that a tax of this nature, a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice, is one which is demanded from the very persons who it is intended or desired should pay it? It must be paid in the course of the legal proceeding, whether that is of a friendly or of a litigious nature. It must, unless in the case of the last and final proceeding after judgment, be paid when the ultimate termination of those proceedings is uncertain; and from the very nature of such proceedings, until they terminate, as a rule, and speaking generally, the ultimate incidence of such a payment cannot be ascertained. In many proceedings of a friendly character the person who pays it may be a trustee, an administrator, a person who will have to be indemnified by somebody else afterwards. In most proceedings of a contentious character the person who pays it is a litigant expecting or hoping for success in the suit; and, whether he or his adversary will have to pay it in the end, must depend upon the ultimate termination of the controversy between them. The legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon anyone else. Therefore it cannot be a tax demanded "from the very persons who it is intended or desired should pay it;" for in truth that is a

10 *App. Cas.* p. 144.

(1) Disc. *Cotton* v. *The King*, *post*, p. 801.

matter of absolute indifference to the intention of the legislature. And, on the other hand, so far as relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified; and the law which exacts it cannot assume, that that expectation and intention may not be realised. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd section of the 92nd clause of the Act in question. Still less can it be called so, if the other view, that of Mr. McCulloch, is correct (1).

That point, which is the main point, and was felt to be so by Mr. Davey in his very able and clear argument, being disposed of, the next question, upon the terms of the same section of the same Act, is that which arises under subs. 14. One of the things which are to be within the powers of the provincial legislatures—within their exclusive powers—is the administration of justice in the province, including the constitution, maintenance, and organisation of provincial Courts, and including the procedure in civil matters in the Courts. Now it is not necessary for their Lordships to determine whether, if a special fund had been created by a provincial Act for the maintenance of the administration of justice in the provincial courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been applicable. That may be an important question which will be considered in any case in which it may arise; but it does not arise in this case. This Act does not relate to the administration of justice in the province; it does not provide in any way, directly or indirectly, for the maintenance of the provincial Courts; it does not purport to be made under that power, or for the performance of that duty. The subject of taxation, indeed, is a matter of procedure in the provincial Courts, but that is all. The fund to be raised by that

10 *App. Cas.* p. 145.

(1) Dist. *Bank of Toronto* v. *Lambe*, *post*, p. 385.

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taxation is carried to the purposes mentioned in the 2nd sub-section; it is made part of the general consolidated revenue of the province. It, therefore, is precisely within the words "taxation in order to the raising of a revenue for provincial purposes." If it should greatly exceed the cost of the administration of justice, still it is to be raised and applied to general provincial purposes, and it is not more specially applicable for the administration of justice than any other part of the general provincial revenue.

Their Lordships, therefore, think that it cannot be justified under the 14th sub-section.

With regard to the third argument, which was founded upon the 65th section of the Act, it was one not easy to follow, but their Lordships are clearly of opinion that it cannot prevail. The 65th section preserves the pre-existing powers of the Governors or Lieutenant-Governors in Council to do certain things not there specified. That, however, was subject to a power of abolition or alteration by the respective legislatures of Ontario and Quebec, with the exception, of course, of what depended on Imperial legislation. Whatever powers of that kind existed, the Act with which their Lordships have to deal neither abolishes nor alters them. It does not refer to them in any manner whatever. It is said that, among those powers there was a power, not taken away, to lay taxes of this very kind upon legal proceedings in the Courts, not for the general revenue purposes of the province, but for the purpose of forming a special fund, called "the Building and Jury Fund," which was appropriated for purposes connected with the administration of justice. What has been done here is quite a different thing. It is not by the authority of the Lieutenant-Governor in Council. It is not in aid of the Building and Jury Fund. It is a Legislative Act without any reference whatever to those powers, if they still exist, quite collateral to them; and, if they still exist, and if it exists itself, capable of being exercised concurrently with them; to tax, for the general purposes of the province, and in aid of the general revenue, these legal proceedings.

10 *App. Cas.* p. 146.

It appears to their Lordships that, unless it can be justified under the 92nd section of the British North America Act, it cannot be justified under the 65th.

Their Lordships must, therefore, humbly advise Her Majesty to dismiss this appeal.

Solicitors for appellant: *Freshfields & Williams.*

EXCHANGE BANK *v.* THE QUEEN, 11 APP. CAS. 157.

J. C.*
1885
Dec. 18, 19.
1886
Feb. 18.

THE EXCHANGE BANK OF CANADA AND OTHERS . . . . . } APPELLANTS;

AND

THE QUEEN . . . . . RESPONDENT.

(CONSOLIDATED APPEALS.)

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, LOWER CANADA.

Rights of the Crown in Lower Canada—Priority of Payment in respect of the Crown's "Comptables"—Sect. 1994 *of Civil Code—Sect.* 611 *of Civil Procedure Code—Conflict between the Codes—Construction.*

Held, that the Crown is bound by the two Codes of Lower Canada, and can claim no priority except what is allowed by them. Being an ordinary creditor of a bank in liquidation, it is not entitled to priority of payment over its other ordinary creditors.

Prior to the Codes the law relating to property in the province of Quebec was, except in special cases, the French law, which only gave the King priority in respect of debts due from "comptables," that is, officers who received and were accountable for the King's revenues.

Art. 1994 of the Civil Code must be construed according to the technical sense of "comptables." And

Art. 611 of the Civil Procedure Code, giving to the Crown priority for all its claims, must be modified so as to be in harmony therewith. Accordingly, by its true construction, the intention of the Legislature was that "in the absence of any special privilege the Crown has a preference over unprivileged chirographic creditors for sums due to it by the defendant being a person accountable for its money."

Appeal from two judgments of the Court of Queen's Bench (April 2, 1885, Monk, Ramsay, and Baby, JJ., Dorion, C.J., dissenting), reversing two judgments of the Superior Court for Lower Canada, district of Montreal (Dec. 1, 1884), which were in favour of the appellants.

The question raised was whether the Crown has any priority or privilege over other creditors in respect of a debt due from a company in liquidation.

The following are the material facts of the case:— 11 *App. Cas. p.* 158.

In September, 1883, the Exchange Bank of Canada, having its principal office at Montreal, was put in liquidation under the Act

* *Present*:—LORD FITZGERALD, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

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45 Vict. c. 23 (Canada), and the appellants, Campbell, Matthews, and Darling, were appointed liquidators.

On the 10th of March, 1884, the respondent, the Minister of Finance and Receiver-General of Canada, filed with the liquidators, in the name of the Queen, a claim against the estate of the bank for $237,840·24 with interest upon the sum of $200,000, at the rate of 5 per cent. per annum, from the 20th of June, 1883, stating the nature of the claim to be two deposits of $100,000 each, made on behalf of the Dominion of Canada on the 17th of April and the 12th of May respectively, for which deposit receipts were given, and a sum of $37,840·24, being the balance due on a banking account of the Dominion with the Exchange Bank, and claiming payment in priority to all other creditors.

On the 15th of March, 1884, the respondent, Attorney-General for the province of Quebec, filed with the liquidators in the name of the Queen a claim against the estate of the bank for $75,000, being the amount of a deposit made with the bank on behalf of the province of Quebec on the 8th of September, 1883, payable with interest at the rate of 5 per cent. per annum for which a deposit note was given, and demanded payment in priority to all other creditors.

On the 23rd of June, 1884, the appellant, Louis Huet Massue, instituted two suits (which may be called the Dominion suit and the Quebec suit) by filing two petitions in the Superior Court for the province of Quebec, district of Montreal, in which, as an unsecured creditor for over $20,000, he prayed to be permitted to oppose the above claims of the Crown in regard to the Dominion of Canada and the province of Quebec respectively, on behalf of himself and the other unsecured creditors, and that it might be declared that the Crown is not entitled to any privilege or priority in respect of the said debts over the ordinary unsecured creditors of the bank.

The liquidators of the bank consented to the contestation of the appellant Massue, and the Superior Court gave him leave to contest the claim of the Crown on behalf of himself and the other unsecured creditors at the expense of the bank both in the Dominion and the Quebec suit.

11 *App. Cas.* p. 159.

On and before the 10th of July, 1884, answers on behalf of the Crown, and replications on behalf of the respondent Massue were respectively filed in both suits.

On the 10th of July, 1884, the Merchants' Bank of Canada, an incorporated company, having its principal office at Montreal,

filed two petitions for intervention in the Superior Court in both the above suits as the holder of notes of the Exchange Bank issued for circulation of the nominal value of $3050, and by virtue of sect. 12 of the Banking Act, 1880 (43 Vict. c. 22, of Canada), claimed priority for these and other similar notes of the Exchange Bank over the claims of the Crown.

The Crown disputed the special privilege claimed by the Merchants' Bank, but the judgment of the Superior Court maintaining it was unanimously confirmed by the Judges in the Court of Appeal. The Crown made no appeal from these decisions, which were acquiesced in by respondents.

Both the suits came on for hearing on the 1st of December, 1884, in the Superior Court, before Mr. Justice Mathieu, who decided against the claim of the Crown.

He held that the privilege claimed by the Crown, being not a direct but an incidental privilege of the Crown, was regulated by the Civil Law of Quebec derived from the law of France, that the ancient law of France gave no privilege to the Crown in a case such as the present; and that neither the Civil Code nor the Code of Civil Procedure (and especially article 611 of the latter Code), gave any such privilege to the Crown.

In giving judgment in the Court of Queen's Bench, all the judges concurred in the opinion of Mr. Justice Mathieu:—

1. "That the privilege of the Crown, for its claim over those of private competing creditors, is to be governed by the law of Canada and not by the law of England;"
2. That the claim of the respondents is not supported by the provisions of the Civil Code of Lower Canada, nor the long established jurisprudence of the country, both which limit the general privilege of the Crown to "claims against persons accountable for its moneys"—comptables—Civil Code, art. 1994; 11 *App. Cas.* *p.* 160.
3. That the bank was not a "comptable"—or person accountable for the Crown's moneys—in the contemplation of the laws of France or of Lower Canada;
4. That in the present instance the Crown has no "special privilege" to be paid by preference.

The learned judges differed solely with regard to the interpretation of the art. 611 of the Code of Civil Procedure, under the heading: "of the sale of moveables under execution":

"In the absence of any special privilege, the Crown has a preference over chirographic creditors for sums due to it by the defendant."

J. C. 1885

EXCHANGE BANK OF CANADA v. THE QUEEN.

Mr. Justice Ramsay regarded this article as "totally new law," and as "a very evil innovation;" but, applying the rules of interpretation of statutes, could not disregard it. The majority of the Court were "therefore constrained, most unwillingly, to reverse the judgment" of Mr. Justice Mathieu.

Chief Justice Dorion, on the other hand, sought to reconcile art. 611 with the existing jurisprudence and the provisions of the Civil Code, by construing the two Codes together as if they formed one code. He reviewed the arts. 1989 and 1994 of the Civil Code, and arts. 607 and 611 of the Code of Procedure, and declared: "My reading of these combined articles, concerning the privileged claims of the Crown, is, that when the Crown has a special privilege, its claim shall, according to art. 607, be paid by preference to all other creditors; and that when the Crown has no special privilege, its other privileged claims, that is, those mentioned in art. 1994 (which are limited to claims against 'persons accountable for its moneys'), shall be paid in preference to those of the ordinary chirographic creditors."

Sect. 1994 of the Civil Code is as follows: "The claims which carry a privilege upon moveable property are the following, and when several of them come together they take precedence in the following order, and according to the rules hereinafter declared, unless some special law derogates therefrom: . . .

(10.) "To the claims of the Crown against persons accountable for its moneys—la couronne pour créances contre ses comptables."

11 *App. Cas.* p. 161.

Davey, Q.C., and *McMaster*, Q.C. (Canada) (*Trenholme* (Canada), with them), for the appellants, contended that the Crown had not the priority claimed. The claim must be decided according to the rights and prerogatives of the Crown as they existed at the time that Canada was ceded to Great Britain. Before the cession the laws in force in Canada were derived from France. At the time of the cession those laws were guaranteed to the people of the province. In 1774 the laws of Canada were secured to them in all matters relating to property and civil rights by 14 Geo. 3, c. 83, s. 8, referred to and construed in *Citizens Insurance Company of Canada* v. *Parsons* (1). Reference was made to Blackstone on King's Prerogative, see the Commentaries, ch. 7, p. 239; Chitty's Prerogative of the Crown, ch. 3, p. 25. By the French law as it prevailed before the introduction of the Codes, the priority of the Crown extended only to "comptables," who are persons accountable for its moneys, the word having in French law a technical and well-recognised meaning, namely, to describe

(1) 7 App. Cas. 111, *ante*, *p.* 267.

a class of officers who had the collection and management of the Crown revenues, and were accountable therefor.

Reference was made to an Edict of 1669, and Pothier's Comment thereon, in 9 Pothier (ed. Burgnot), p. 468, No. 169; Ferrière's Dictionnaire de droit, vo. Comptable; Nouveau Denizart, vo. Comptable, vol. i., p. 576, where there is a report of a decision of the 14th of May, 1748, in the case of the Sieur Bouvelais; Sirey's Decisions, pt. 1, p. 369, where there is a case decided in 1843, and several authorities cited; Merlin's Répertoire, vo. Privilege, vol. 5, p. 902, sect. 2, para. 3, art. 4; *Attorney-General* v. *Black* (1); *Monk* v. *Ouimet* (2); *Ouimet* v. *Marchand* (3). This question, however, is now regulated by the Canadian Codes. Art. 6 of Civil Code directs that the law of Lower Canada is applicable to privileges and rights of lien, to public policy and the rights of the Crown. The provisions of the Civil Code in reference to the rights and privileges of the Crown have never been repealed, but on the contrary are "continued in force," by the British North America Act, 1867, s. 129. By the Civil Code, sects. 1989 and 1994, the Crown rights are restricted, and as regards this case, its claim of priority is only against "ses comptables." The Exchange Bank is not the "comptable" of the Crown, according to the meaning of that word, which is a term of art under French law. As regards sect. 611 of the Civil Procedure Code, the object of that Code is not to express substantive law, but merely those provisions which relate to procedure in civil matters. The object of the article is not to repeal those articles of the Code which declare the privileges of the Crown, but to provide a rule of procedure, to prescribe details of carrying out the provisions of the Code. It should be construed as bearing on the immediate scope and object of the arts. 605, 611, not as by implication repealing the substantive law contained in the Code. The two Codes must be construed together so as to harmonize: see 31 Vict. c. 7, s. 10 (Quebec). So construed, art. 611 relates to "comptables" as provided in art. 1994 of Civil Code. Upon the point of construction the following authorities were cited: *Hawkins* v. *Gathercole* (4); *Eyston* v. *Studd* (5); *Caledonian Railway Company* v. *North British Railway Company* (6); *Carter* v. *Molson* (7).

11 *App. Cas* p. 162.

Sir *F. Herschell*, Q.C., and *Church*, Q.C. (Canada) (*Jeune* with them), for the respondent, as represented in the two appeals by

(1) Stewart's L. C. R. 324.
(2) 19 L. C. J. 71.
(3) 5 Revue Legale, 361.
(4) 6 De G. M. & G. 1, 20.
(5) Plowden's Reports, 465, and see also p. 204.
(6) 6 App. Cas. 114.
(7) 8 App. Cas. 530.

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the Minister of Finance and Receiver-General of Canada, and the Treasurer and Attorney-General of Quebec, contended that the decision of the majority of the judges of the Court of Queen's Bench was correct. The case did not rest solely on art. 611 of the Civil Procedure Code, under which, when read with art. 1994 of the Civil Code, the Crown is by express enactment entitled to the right claimed. They contended (1) that the Crown has the same prerogatives in Canada as elsewhere in the Queen's dominions, and that the recent decisions of the Canadian Courts to the contrary are against reason and authority; (2) that under the French law the rights of the Crown are not so limited as was contended for on the other side; (3) the claim is made in a winding-up. While the creditors generally would be prevented from seizing the property of the bank after it had gone into liquidation, the Winding-up Acts do not mention the Crown, and consequently the Crown could have taken out execution in this case, for the Crown could not be restrained from so doing as private creditors could. As to this point, effect was recently given to it in the case of *In re Oriental Bank Corporation, Ex parte The Crown* (1). Then with regard to the first point, it was contended that the prerogatives, rights, and privileges of the Crown in the province of Quebec are such as existed in England at the time of the conquest of that country, and its cession by treaty to England. By virtue of such rights and privileges the Crown is entitled in Quebec, as in England, to be paid in priority to other creditors as regards debts of equal degree. Where a cession is on terms of continuing laws inconsistent with such prerogatives that would be an exception. The treaty of capitulation was referred to, arts. 41 and 42, and the treaty of peace, as shewing that the inhabitants were to become British subjects, and that their claim to be left in a different status to other subjects of the British Crown was refused: 14 Geo. 3, c. 83. Sect. 8 referred to on the other side was intended to regulate their concerns inter se, not to modify or diminish the Sovereign's prerogatives. When a constitution was given to Quebec, and afterwards to United Canada, and after that to the Dominion of Canada, no modification of the prerogative power was introduced into such constitution. Even if the treaty and statute of 1774 had modified the rights of the Crown, they revived when the people accepted the constitution. There is nothing beyond the cession and the Act upon which the appellants can found an argument that the full prerogatives of the Crown do not exist in Canada. Reference was made to

11 *App. Cas.* p. 163.

(1) 28 Ch. D. 643.

Act XLIII. of 1866 (Upper Canada). With regard to the second point, by French law the privilege of the Crown did not apply solely to "comptables." Reference was made to Lebret on the Sovereignty of the Crown, pp. 427, 429—a work published in 1632. This bank having received moneys from the Crown knowing them to be Crown moneys is accountable: *In re Henley & Co.* (1).

Davey, Q.C., replied.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

1886 *Feb.* 18. 11 *App. Cas.* p. 164.

The sole ultimate question in this case is whether the Crown, being an ordinary creditor of the bank which has been put in liquidation, is entitled to priority of payment over its other ordinary creditors. That again depends on the question how the two Codes of Lower Canada are to be construed. Their Lordships think it clear, not only that the Crown is bound by the Codes, but that the subject of priorities is exhaustively dealt with by them, so that the Crown can claim no priority except what is allowed by them. If so, the other points which have been elaborately treated both in the colony and here are only of subsidiary importance, though undoubtedly they have a bearing on the construction of the Codes.

Their Lordships are also clear that the law relating to property in the province of Quebec or in Lower Canada, from 1774 to 1867 when the Codes came into force, must be taken to be the "Coutume de Paris," except in such special cases as may be shewn to fall under some other law. Probably such was the true effect of the statute 14 Geo. 3, c. 83, but at all events there has been an uniform current of decision to that effect in the colony, dating back forty years or so before the date of the Codes, which ought not now to be questioned.

The next question is whether the French law gave to the King a priority in respect of all his debts, or in respect only of those due from "comptables." There does not seem to have been any difference of opinion on the point in the colony. The three judges who decided for the Crown upon the ultimate question, and the two judges who decided the other way, all thought that the priority given by the French law extended only to "comptables." And in the appellants' case filed on the appeal from Mr. Justice Mathieu it is elaborately argued that the English

(1) 9 Ch. D. 469.

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law and not the French prevailed in Lower Canada, but it is never suggested that the priority now claimed could be claimed under the French law. That suggestion however has been made upon this appeal to Her Majesty, and has been strongly contended for at the Bar.

The matter rests wholly upon the French authorities, and it appears to their Lordships that the passage cited from Pothier is conclusive of the question unless it can be contradicted or explained away. It is not conceivable that the advisers of Louis XIV. should, if an unlimited priority existed, address themselves to the exact definition by edict of a limited priority, or that Pothier should comment on that edict, all without any reference to the more sweeping rule. But so far from being contradicted or explained away, the passage in question is supported and emphasized by later authorities. There is the case reported by Sirey shewing one limit of the King's priority; viz. that his right against "comptables" did not extend even to purveyors who might have been paid in advance. There are the authorities cited in the note to that case, who all draw the distinction between the one kind of Crown debtor and the other. There is the authority of the Nouveau Denisart, expressly drawing the distinction between the official debts of the "comptable" and his private debts due to the King, and the case of the Sieur Bouvelais which illustrates that distinction.

11 *App. Cas.* *p.* 165.

If the priority contended for existed in the French law, there could be no difficulty in producing authority to that effect. English text-books and reports abound with assertions of the King's prerogative as we know it. But absolutely no authority was produced in the colony in opposition to the decision of Mr. Justice Mathieu, and now nothing is produced except the work of a counsellor of state writing in the year 1632.

Taking the French law to be as laid down by the whole of the judges below, the next question is, what is the proper construction of art. 1994 of the Civil Code? And the only difficulty in it when considered alone arises from the use of the expressions "ses comptables" and "persons accountable for its moneys." Here again we have complete accord among the judges in the colony, that the expressions indicate not all the debtors of the Crown, but a limited class of such debtors, known to French lawyers under the name of "Comptables." The strongest expression of opinion to that effect is uttered by the judges who decided in favour of the Crown. That opinion however is earnestly combated in this appeal.

That the word "Comptables" is a technical term of French law, denoting officers who receive and are accountable for the King's revenues, has been abundantly shewn from the Law Treatises cited at the Bar. It has not been shewn that in legal documents the word is ever used in the general sense of "debtor" or "person responsible." It stands in the Code as it is likely a term of art would stand, as a noun substantive, which explains itself to lawyers by itself, and does not require the addition of any explanatory words, such as in the English version are found necessary because there is no corresponding English substantive. The draftsmen of the Code were working on the existing basis of French law. They were in the main mapping out a system of French law. It would be a marvellous thing indeed if persons so engaged were to use a technical term with a definite meaning well-known to French lawyers, and precisely adapted to the position it occupies in the Code, and yet should intend to use it in some other sense, which is not its technical sense, for which it is not shewn to be ever used, and for which other words are used.

Even the general dictionaries, five or six of which their Lordships have consulted, do not lend any countenance to the respondent's argument.

The Académie first speaks of the word as a noun adjective thus:—"Qui est assujetti à rendre compte; officier; agent comptable; les receveurs sont comptables. Je ne veux point de place d'emploi comptable," which Tarver translates, "I don't want a place where accounts are kept."

As a substantive it is said to be thus used:—"Les comptables sont sujets à être recherchés. C'est un bon comptable," i.e., a good accountant.

Laveaux says very much the same as the Académie. Both shew that the word is used metaphorically, as "Nous sommes comptables de nos talens."

Littré defines the adjective thus:—"Qui a des comptes à tenir et à rendre, officier, agent comptable;" and he gives the metaphorical use. Of the substantive he says, "Celui qui est tenu de rendre compte de deniers et de son emploi."

Bouillet, in his "Dictionary of Commerce," says of the word as a substantive, "Le mot s'applique à toute personne qui est assujettie à rendre compte des affaires qu'elle a gérée."

Contanseau and Spiers render it in English, "An accountant. A responsible agent."

Their Lordships have not found any trace of its being used in

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the general sense of a debtor or person under liability except in metaphor.

Tarver and Spiers render "debtor" simply by the word "débiteur."

Coming down to its special use in the instrument now being construed, their Lordships have found many passages in the Civil Code where the words "comptable" and "compte" are used strictly of those who are bound to account for particular transactions:—

11 *App. Cas.* p. 167.

As of a tutor, art. 308 et seq.
of an héritier bénéficiaire, art. 677.
of an executor, art. 913 et seq.
of a husband for his wife's goods, art. 1425.
of an agent, art. 1713.
of partners, art. 1898.

They have not been referred to and they have not found any passage in the Civil Code where these words are used to denote generally a debtor or person under liability.

For creditors and debtors the words used are "créanciers" and "débiteurs," see tit. III. throughout, and particularly cap. 7.

To express general liability the Code uses such verbs as "Tenir," "Répondre," "Charger," and their inflexions or derivatives.

If there be any difference between the French and English versions, their Lordships think that in a matter which is evidently one of French law, the French version using a French technical term should be the leading one. There might be cases in which such a question would arise. But it does not arise here. The expression "persons accountable for its moneys" is not calculated to convey to the mind of an English lawyer the notion of an ordinary debtor or of a banker. As between a banker and his customers, he, by English law, is an ordinary debtor, and the amount which he owes them is not "their" money, nor is he "accountable" for it in any but a popular sense. Arts. 1778 and 1779 of the Civil Code seem to be founded on the same view. Mr. Justice Ramsay says that to call a debtor accountable to his creditor would be a perversion of language. Their Lordships, without going so far, cannot see why, if the draftsmen of the English version intended to speak of debtors, they should not have used the common term for the purpose. Or rather they would have used no term at all, but would simply have mentioned the claims of the Crown, as they have mentioned the claims of the vendor and the lessor. In fact the terms used are strong

11 *App. Cas.* p. 168.

evidence that in this passage the English version is really a translation from the French, and that in translating a French technical term for which there is no English equivalent, the draftsmen have used the best periphrasis they could think of. Their words are quite applicable to a "Comptable," i.e., an officer collecting revenue, bound to earmark the funds, to account for them, and not to use them as his own. Such is the position of an officer under Act 31 & 32 Vict. c. 3, s. 18, as set out in the record. They may possibly include some other cases, but they are not applicable to a bank receiving money on deposit or current account.

Construing the words according to the technical sense of "Comptables," we come to the last question; which is the construction of art. 611 of the Procedure Code.

In this article, the word "defendant" is used with strict accuracy in reference to the subject-matter of the title under which it is found, but must receive a reasonable latitude of construction in applying the article to cases where there is no defendant. And it would seem that the words "in the absence of" would require to be read in the meaning of "subject to"; for it can hardly have been meant that the rule was not to apply in any case where there were some special privileges to be answered. When construed in all other respects literally the article certainly gives to the Crown the priority claimed for it in this suit. But then it comes into conflict with art. 1994 of the Civil Code.

In the first place, by giving to the Crown a priority for all its claims, it swamps the limited priority given by the 10th head of art. 1994, and renders that head unmeaning. But beyond this there is actual inconsistency between the two articles. According to the literal construction of 611, the Crown has priority over funeral expenses and other classes of debts which by 1994 have priority over the Crown.

It would seem that the majority of the Queen's Bench paid no attention to this conflict. They say they are asked to "set aside" 611 on the ground that it got into the Code in some wrongful way. They were asked to do so, and were quite right in their refusal. But they were also asked to construe the Codes as they stand, and as Mr. Justice Mathieu had done. They do not notice the conflict of 611 with 1994 or the necessity of modifying the construction of one or the other. But the duty of the judge is, if possible, to reconcile the two, and for that purpose to look at all relevant circumstances. 11 *App. Cas.* p. 169.

The appellants at the Bar have pressed somewhat too absolutely

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the argument that a Procedure Code is not intended to enact substantive law, and that this part of the Procedure Code is only intended to give directions to the Courts how to carry the rules of the Civil Code into effect. Some of the articles of the Procedure Code (e.g., art. 610) do create or establish rights not touched by the Civil Code. The two Codes should be construed together in this part just as if the articles of the Procedure Code followed the corresponding articles of the Civil Code.

So reading them, we find that the main purpose of this part of the Procedure Code is to carry into detail the principles laid down in the Civil Code, which are repeated in the form of directions how money is to be distributed. And where fresh classes of priorities are established, they are subordinate classes not interfering with the larger classification of the Civil Code. Of course it could be no part of the Procedure Code to contravene the principles of the Civil Code, and it is clear from art. 605 that the two were believed to be working in harmony. And when the Procedure Code is found to overlap the Civil Code, and so it becomes necessary to modify the one or the other, the fact that the function of the Procedure Code is in this part of it a subordinate one favours the conclusion that it is the one to be modified.

That there should have been any deliberate intention of giving a large extension of privilege to the Crown by the indirect method of inserting a provision in a group of clauses relating to a judicial distribution of property taken in execution, is a thing highly improbable in itself. And the improbability is much heightened by the fact that at the same instant the legislature was engaged in cutting down throughout Upper Canada the very same privilege which it is held to have been setting up throughout Lower Canada.

11 *App. Cas.* *p.* 170.

The foregoing are their Lordships' reasons for concluding that full effect should be given to art. 1994, and that art. 611 should consequently be modified so as to be read in harmony with the other. There is difficulty about it, as there always is in these cases of inconsistency. Following the rule laid down for their guidance in such cases by sect. 12 of the Civil Code, their Lordships hold that the meaning of the legislature must have been to speak to the following effect:—"Subject to the special privileges provided for in the Codes, the Crown has such preference over chirographic creditors as is provided in art. 1994." Or, adhering as closely as possible to its rather inaccurate language, "In the absence of any special privilege, the Crown has a prefer-

ence over unprivileged chirographic creditors for sums due to it by the defendant, being a person accountable for its money."

It may be objected that, thus read, the article is only a repetition of what is contained in the Civil Code. That is so, but it will be found that some of this group of articles (art. 607 may be taken as an example), in fixing the rank of recipients of a fund actually under distribution, do contain repetitions of the corresponding articles of the Civil Code which give the same rank in the wider and more abstract form of privileged claims or "créances." The objection therefore is not a serious one, as the repetition results from the principle on which these portions of the two Codes are framed.

This reading is nearly the same as the readings proposed by Mr. Justice Mathieu and Chief Justice Dorion. It is a large modification of the words, but not larger than is required to bring the two sections into harmony. There is ample authority for it in *Carter* v. *Molson* (1), and the other cases cited at the bar, and in that of the *Western Counties Railway Company* v. *Windsor and Annapolis Railway Company* (2).

The result is, that in the opinion of their Lordships the Court of Queen's Bench ought to have dismissed with costs the appeal from the Superior Court. They will now humbly advise Her Majesty to make such a decree. The respondents, by whom the Crown is represented, will pay the costs of the consolidated appeals (3).

Solicitors for the appellants: *Simpson, Hammond, & Co.*
Solicitors for the respondent: *Bompas, Bischoff, Dodgson, & Coxe.*

(1) 8 App. Cas. 530. (2) 7 App. Cas. 178.
(3) Expl. *Maritime Bank* v. *Receiver-General, post,* p. 417.

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June 10, 11, 22, 29; *July* 9.

BANK OF TORONTO *v.* LAMBE, 12 APP. CAS. 575.

BANK OF TORONTO . . . . . DEFENDANT;

AND

LAMBE . . . . . PLAINTIFF.

MERCHANTS' BANK OF CANADA . . . DEFENDANT;

AND

LAMBE . . . . . PLAINTIFF.

CANADIAN BANK OF COMMERCE . . . DEFENDANT;

AND

LAMBE . . . . . PLAINTIFF.

NORTH BRITISH MERCANTILE INSURANCE COMPANY, AND OTHERS . . . . . DEFENDANTS;

AND

LAMBE . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Law of Canada—Distribution of Legislative Powers—British North America Act, 1867, *s.* 91, *cl.* 2, 3, 15, *s.* 92, *cl.* 2—*Direct Taxation.*

Held, that Quebec Act 45 Vict. c. 22, which imposes certain direct taxes on certain commercial corporations carrying on business in the province, is intra vires of the provincial legislature.

A tax imposed upon banks which carry on business within the province, varying in amount with the paid-up capital and with the number of its offices, whether or not their principal place of business is within the province, is direct taxation within clause 2 of sect. 92 of the British North America Act, 1867, the meaning of which is not restricted in this respect by either clause 2, 3, or 15, of sect. 91.

Similarly, with regard to insurance companies taxed in a sum specified by the Act.

The first three appeals were from three decrees of the Court of Queen's Bench (Jan. 23, 1885) reversing decrees of the Superior Court for Lower Canada in the district of Montreal (May 12, 1883); the fourth appeal was from a decree of the Court of Queen's Bench (Jan. 23, 1885) affirming a decree of the Superior Court (May 23, 1884).

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, and SIR RICHARD COUCH.

The several actions were brought by the respondent in his capacity of license inspector for the revenue district of Montreal against the several appellants to recover the amount of certain taxes imposed on the appellants by Quebec Act, 45 Vict. c. 22. With the fourth action thirty-seven other actions by the same plaintiff against thirty-seven other insurance companies had been consolidated. The question in all the cases was whether the Act in question was valid, which depended upon whether it was within the powers conferred upon the provincial legislatures by the British North America Act of 1867. The four appeals were not heard together; but as the question in issue was the same their Lordships intimated at the close of the appellant's arguments in the first case that they would either deliver judgment therein before hearing the later appeals or reserve judgment until they had heard two counsel in respect of all three appeals.

The facts are stated in the judgment of their Lordships.

W. H. Kerr, Q.C. (Canada), and *Kenelm Digby*, for the appellant in the first appeal.

Cohen, Q.C., and *W. W. Kerr*, for the appellant in the second appeal.

Blake, Q.C. (Canada), and *Jeune*, in the third appeal.

W. H. Kerr, Q.C. (Canada), and *W. W. Kerr*, in the fourth appeal.

Geoffrion, Q.C. (Canada), and *Fullarton*, for the respondent in all appeals.

Kerr, Q.C., and *Digby*, in the first appeal contended that the judgment of the Supreme Court was wrong, and that 45 Vict. c. 22, was void.

The question of its validity turns on (1) the construction of sect. 92 of the British North America Act, 1867, (2) on the further question whether even if the statute is primâ facie within the powers conferred by sect. 92 its subject-matter does not belong to the matters exclusively reserved to the Dominion parliament by sect 91. In the latter case the provisions of sect 92, if construed unfavourably to the appellant, are overborne by those of sect. 91, and the statute is invalid. Reference was made to *Attorney-General for Quebec* v. *Queen Insurance Company* (1); *Citizens Insurance Company* v. *Parsons* (2); *Dobie* v. *Temporalities Board* (3); *Russell* v. *The Queen* (4); *Hodge*

12 *App. Cas.* p. 577.

(1) 3 App. Cas. 1090, *ante*, p. 222.
(2) 7 App. Cas. 96, *ante*, p. 267.
(3) 7 App. Cas. 136, *ante*, p. 293.
(4) 7 App. Cas. 829, *ante*, p. 310.

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v. *The Queen* (1); *Cushing* v. *Dupuy* (2). The statute is not within the powers conferred by sect. 92, § 2, for the following reasons:—

First, the taxation sought to be imposed by the statute is not within the province. The bank was incorporated by the Act of the parliament of Canada prior to the British North America Act, namely, by 18 Vict. c. 205, whereby it was provided that the head office of the bank should be at Toronto in the province of Ontario: see subsequent statutes affecting the bank, 20 Vict. c. 160, 31 Vict. c. 11, 33 Vict. c. 11, 34 Vict. c. 5. It is admitted that far the greater portion of the capital belongs to persons not residing in the province of Quebec. The provincial legislature can only have jurisdiction to impose taxes on property situated within the province, or on persons residing within the province. No other sense can be given to the words "within the province." The cases decided on the Income Tax Acts shew that the corporation in the present case cannot be considered as "within the province:" *Sulley* v. *Attorney-General* (3); *Attorney-General* v. *Alexander* (4): *Cesena Sulphur Co.* v. *Nicholson* (5); *Gilbertson* v. *Fergusson* (6).

Second, the tax is not a "direct tax" within the meaning of sect. 92, § 2. The question is, what did the legislature in 1867 mean by a direct tax? The tax imposed must be shewn to be a direct tax, and not either an indirect tax, or a tax falling under neither class: see Mill's Political Economy, book v., ch. 5. The tax is a tax on the right or privilege of carrying on the business of banking in the province and being a tax on a particular business as such must ultimately be paid by the customers of the bank: see Mill's Political Economy, book v., ch. 3; Smith's Wealth of Nations, book v., ch. 2; Fawcett's Manual of Political Economy, book iv., ch. 3; Littrè, Dict. s. v. Contributions. This is the test adopted in *Attorney-General for Quebec* v. *Queen Insurance Company* (7); *Attorney-General for Quebec* v. *Reed* (8). One of the principal characteristics of a direct tax is its generality—falling on all persons alike. It is in this sense that the term is used in the American constitution: see *Hylton* v. *United States* (9); *Veazie Bank* v. *Fenno* (10). Further, the provisions of the British North America Act shew that it was not intended to include a tax of this kind in the class of direct taxes. It is in the nature of a license tax, as mentioned in sect. 92, § 9, taxes of that kind not being classed by the legislature as direct taxes: see, too, *Severn* v.

12 *App. Cas.* p. 578.

(1) 9 App. Cas. 177, *ante*, p. 333.
(2) 5 App. Cas. 409, *ante*, p. 253.
(3) 5 H. & N. 711; S. C. 29 L. J. (Ex.) 464.
(4) Law Rep. 10 Ex. 20.
(5) 1 Ex. D. 428.
(6) 5 Ex. D. 57; S. C. 7 Q. B. D. 562.
(7) 3 App. Cas. 1090, *ante*, p. 222.
(8) 10 App. Cas. 141, *ante*, p. 360.
(9) 3 Dallas, 171.
(10) 8 Wallace, 534.

The Queen (1), where the judges held unanimously that a license tax was not a direct tax. The examination of the provisions of the British North America Act and of other English statutes contained in the judgment of Dorion, C.J., in the Court below, shews that the tax would, according to the views of the English legislature, be regarded as a license or excise tax, at all events for the purpose of collection, and that it was not intended to include any such taxes in the term "direct taxes" in sect. 92, § 2.

Lastly, the subject-matter of the statute falls clearly within sect. 91, and therefore even if within the words of sect. 92 the powers of the Dominion are to prevail over the powers of the Province.

By sect. 91, § 2, the regulation of trade and commerce; § 3, the raising of money by any mode or system of taxation; § 14, the currency and coinage; § 15, banking and incorporation of banks; § 19, interest; § 20, legal tender, are reserved for the exclusive jurisdiction of the Dominion legislature. The Dominion has exercised these powers by incorporating and regulating banks, providing for the amount of the debts which they may incur, the amount of reserve which they must hold in Dominion notes, and for the circulation of Dominion notes: see Statutes of Canada, 18 Vict. c. 205; 34 Vict. c. 5, §§ 14, 15, 16; 49 Vict. c. 6. It is submitted that it is impossible for the Dominion legislature to exercise these powers if banks as such are subject to taxation by the provincial legislatures. "The power to tax involves the power to destroy:" see *McCulloch* v. *Maryland* (2); *Osborn* v. *United States Bank* (3); *Railroad Co.* v. *Peniston* (4); Kent's Commentaries (by Holmes), vol. i. p. 426.

12 *App. Cas.* p. 579.

Cohen, Q.C., and *Blake*, Q.C., were subsequently heard for the appellants in the other cases in compliance with the above intimation from their Lordships.

The counsel for the respondent were not called upon.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

1887
July 9.

These appeals raise one of the many difficult questions which have come up for judicial decision under those provisions of the British North America Act, 1867, which apportion legislative powers between the parliament of the Dominion and the legislatures of the Provinces. It is undoubtedly a case of great constitutional importance, as the appellants' counsel have earnestly impressed upon their Lordships.

(1) 2 Supreme Court of Canada Rep. p. 70.
(2) 4 Wheaton, 436.
(3) 9 Wheaton, 738.
(4) 18 Wallace, 5.

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But questions of this class have been left for the decision of the ordinary Courts of law, which must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes. A number of incorporated companies are resisting payment of a tax imposed by the legislature of Quebec, and four of them are the present appellants. It will be convenient first to deal with the case of the Bank of Toronto, which was argued first.

12 *App. Cas.* p. 580.

In the year 1882 the Quebec legislature passed a statute entitled "An Act to impose certain direct taxes on certain commerical corporations." It is thereby enacted that every bank carrying on the business of banking in this province; every insurance company accepting risks and transacting the business of insurance in this province; every incorporated company carrying on any labour, trade, or business in this province; and a number of other specified companies, shall annually pay the several taxes thereby imposed upon them. In the case of banks the tax imposed is a sum varying with the paid-up capital, and an additional sum for each office or place of business.

The appellant bank was incorporated in the year 1855 by an Act of the then parliament of Canada. Its principal place of business is at Toronto, but it has an agency at Montreal. Its capital is said to be kept at Toronto, from whence are transmitted the funds necessary to carry on the business at Montreal. The amount of its capital at present belonging to persons resident in the province of Quebec, and the amount disposable for the Montreal agency, are respectively much less than the amount belonging to other persons and the amount disposable elsewhere.

The bank resists payment of the tax in question on the ground that the Quebec legislature had no power to pass the statute which imposes it. Mr. Justice Rainville sitting in the Superior Court took that view, and dismissed an action brought by the government officer, who is the respondent. The Court of Queen's Bench, by a majority of three judges to two, took the contrary view, and gave the plaintiff a decree. The case comes here on appeal from that decree of the Court of Queen's Bench.

The principal grounds on which the Superior Court rested its judgment were as follows:—That the tax is an indirect one; that it is not imposed within the limits of the province; that the parliament has exclusive power to regulate banks; that the provincial legislature can tax only that which exists by their authority or is introduced by their permission; and that if the power to tax such banks as this exists, they may be crushed out by it, and so the power of the parliament to create them may be nullified. The grounds

stated in the decree of the Queen's Bench are two, viz., that the tax is a direct tax, and that it is also a matter of a merely local or private nature in the province, and so falls within class 16 of the matters of provincial legislation. It has not been contended at the bar that the provincial legislature can tax only that which exists on their authority or permission. And when the appellants' counsel were proceeding to argue that the tax did not fall within class 16, their Lordships intimated that they would prefer to hear first what could be said in favour of the opposite view. All the other grounds have been argued very fully, and their Lordships must add very ably, at the bar.

12 *App. Cas.* p. 581.

To ascertain whether or no the tax is lawfully imposed, it will be best to follow the method of inquiry adopted in other cases. First, does it fall within the description of taxation allowed by class 2 of sect. 92 of the Federation Act, viz., "Direct taxation within the province in order to the raising of a revenue for provincial purposes?" Secondly, if it does, are we compelled by anything in sect. 91 or in the other parts of the Act so to cut down the full meaning of the words of sect. 92 that they shall not cover this tax?

First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words "direct," and "indirect," according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have

12 *App. Cas.* p. 582.

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contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

After some consideration Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. That definition is as follows:—

"Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.

"The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

It is said that Mill adds a term—that to be strictly direct a tax must be general; and this condition was much pressed at the Bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the Appellant's counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act (1).

12 *App. Cas.* p. 583.

Now whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec legislature must have intended and desired that the very corporations from whom the tax is demanded should pay and finally bear it. It is carefully designed for that purpose. It is not like a

(1) Disc. *Cotton* v. *The King, post*, p. 802.

customs' duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intend it to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the bank apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec Government. For these reasons their Lordships hold the tax to be direct taxation within class 2 of sect. 92 of the Federation Act (1).

There is nothing in the previous decisions on the question of direct taxation which is adverse to this view. In the case of *Queen Insurance Co.* (2) the disputed tax was imposed under cover of a license to be taken out by insurers. But nothing was to be paid directly on the license, nor was any penalty imposed upon failure to take one. The price of the license was to be a percentage on the premiums received for insurances, each of which was to be stamped accordingly. Such a tax would fall within any definition of indirect taxation, and the form given to it was apparently with the view of bringing it under class 9 of sect. 92, which relates to licenses. In *Reed's Case* (3) the tax was a stamp duty on exhibits produced in courts of law, which in a great many, perhaps most, instances would certainly not be paid by the person first chargeable with it. In *Severn's Case* (4) the tax in question was one for licences which by a law of the legislature of Ontario were required to be taken for dealing in liquors. The Supreme Court held the law to be ultra vires, mainly on the grounds

12 *App. Cas.* p. 584.

(1) Fol. *Brewers and Maltsters* v. *Ontario, post*, p. 533.
(2) 3 App. Cas. 1090, *ante*, p. 230.
(3) 10 App. Cas. 141, *ante*, p. 360.
(4) 2 Sup. Court of Canada, 70.

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that such licences did not fall within class 9 of sect. 92, and that they were in conflict with the powers of parliament under class 2 of sect. 91. It is true that all the judges expressed opinions that the tax, being a licence duty, was not a direct tax. Their reasons do not clearly appear, but, as the tax now in question is not either in substance or in form a licence duty, further examination of that point is unnecessary.

The next question is whether the tax is taxation within the province. It is urged that the bank is a Toronto corporation, having its domicil there, and having its capital placed there; that the tax is on the capital of the bank; that it must therefore fall on a person or persons, or on property, not within Quebec. The answer to this argument is that class 2 of sect. 92 does not require that the persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any person found within the province may legally be taxed there if taxed directly. This bank is found to be carrying on business there, and on that ground alone it is taxed. There is no attempt to tax the capital of the bank, any more than its profits. The bank itself is directly ordered to pay a sum of money; but the legislature has not chosen to tax every bank, small or large, alike, nor to leave the amount of tax to be ascertained by variable accounts or any uncertain standard. It has adopted its own measure, either of that which it is just the banks should pay, or of that which they have means to pay, and these things it ascertains by reference to facts which can be verified without doubt or delay. The banks are to pay so much, not according to their capital, but according to their paid-up capital, and so much on their places of business. Whether this method of assessing a tax is sound or unsound, wise or unwise, is a point on which their Lordships have no opinion, and are not called on to form one, for as it does not carry the taxation out of the province it is for the Legislature and not for Courts of Law to judge of its expediency.

12 *App. Cas.* p. 585.

Then is there anything in sect. 91 which operates to restrict the meaning above ascribed in sect. 92? Class 3 certainly is in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the provincial legislatures, exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two sections was noticed by way of illustration in the case of *Parsons* (1). Their Lordships there said (2): "So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in sect. 91;

(1) 7 App. Cas. 96, *ante*, p. 267. (2) 7 App. Cas. 108, *ante*, p. 278.

but, though the description is sufficiently large and general to include 'direct taxation within the province, in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by sect. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one." Their Lordships adhere to that view, and hold that, as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial legislatures.

It has been earnestly contended that the taxation of banks would unduly cut down the powers of the parliament in relation to matters falling within class 2, viz., the regulation of trade and commerce; and within class 15, viz., banking, and the incorporation of banks. Their Lordships think that this contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks. The words "regulation of trade and commerce" are indeed very wide, and in *Severn's Case* (1) it was the view of the Supreme Court that they operated to invalidate the licence duty which was there in question. But since that case was decided the question has been more completely sifted before the Committee in *Parson's Case* (2), and it was found absolutely necessary that the literal meaning of the words should be restricted, in order to afford scope for powers which are given exclusively to the provincial legislatures. It was there thrown out that the power of regulation given to the parliament meant some general or interprovincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in *Parson's Case* (2), they would be straining them to their widest conceivable extent.

12 *App. Cas.* p. 586.

Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes.

(1) 2 Sup. Court of Canada, 70.

(2) 7 App. Cas. 96, *ante*, p. 282.

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There are obvious reasons for confining their power to direct taxes and licences, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning of classes 2 and 9, is, in their Lordships' judgment, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties, in the construction of the Federation Act.

12 *App. Cas.* *p.* 587.

Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. Under that constitution, as their Lordships understand, each state may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the state legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under sect. 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under sect. 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within sect. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion parliament.

It only remains to refer to some of the grounds taken by the learned judges of the Lower Courts, which have been strongly objected to at the Bar. Great importance has been attached to French authorities who lay down that the impôt des patentes, which is a tax on trades, and which may possibly have afforded

hints for the Quebec law, is a direct tax. And it has been suggested that the provincial legislatures possess powers of legislation either inherent in them, or dating from a time anterior to the Federation Act and not taken away by that Act. Their Lordships have not thought it necessary to call on the respondents' counsel, and therefore possibly have not heard all that may be said in support of such views. But the judgments below are so carefully reasoned, and the citation and discussion of them here has been so full and elaborate, that their Lordships feel justified in expressing their present dissent on these points. They cannot think that the French authorities are useful for anything but illustration. And they adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament.

The result is that, though not wholly for the same reasons, their Lordships agree with the Court of Queen's Bench. And they will humbly advise Her Majesty to affirm their decree, and to dismiss the appeal of the Bank of Toronto.

12 *App. Cas.* p. 588.

The other three cases possess no points of distinction in favour of the appellants. That of the Canadian Bank of Commerce is exactly parallel. The Merchants' Bank of Canada has its principal place of business in Montreal, and to that extent loses the benefit of one of the arguments urged in favour of the other banks. The insurance company is taxed in a sum specified by the Quebec Act, and not with reference to its capital, and so loses the benefit of one of the arguments urged in favour of the banks. The cases have been treated as substantially identical in the Courts below, and their Lordships will take the same course with respect to all of them.

The appellants in each case must pay the costs of the appeal.

Solicitors for the Bank of Toronto: *Ingle, Cooper, & Holmes.*

Solicitors for the Merchants' Bank of Canada: *Hewlett & Preston.*

Solicitors for the Canadian Bank of Commerce: *Champion, Robinson, & Poole.*

Solicitors for the Insurance Company: *Hollams, Son, & Coward.*

Solicitors for the respondent: *Simpson, Hammond & Co.*

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ST. CATHERINE'S MILLING CO. *v.* THE QUEEN, 14 APP. CAS. 46.

July 12, 13, 17, 19, 20, 24, 26; *Dec.* 12.

ST. CATHERINE'S MILLING AND LUMBER COMPANY . . . . . } DEFENDANTS;

AND

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR ONTARIO . } PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *s.* 109—*Lands reserved to the Indians—Rights of the Province.*

Sect. 109 of the B. N. A. Act of 1867 gives to each Province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, subject to such rights as the Dominion can maintain under sects. 108 and 117.

Attorney-General of Ontario v. *Mercer* (8 App. Cas. 767) followed.

By royal proclamation in 1763 possession was granted to certain Indian tribes of such lands, "parts of our dominions and territories," as, not having been ceded to or purchased by the Crown, were reserved, "for the present," to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the governor of the colony in which the lands lie, and not by any private person.

In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until that date under the said proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the Government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing:—

Held, that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Crown; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was "an interest other than that of the Province in the same," within the meaning of sect. 109.

Held also, that by force of the said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the Province in terms of sect. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein.

Appeal from a judgment of the Supreme Court, dated June 20, 1887 (Ritchie, C.J., Fournier, Henry, and Taschereau, JJ., Strong and Gwynne, JJ., dissenting), which affirmed a judgment of the Chancery Division of the High Court of Justice for Ontario (June 10, 1885).

* *Present:*—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR RICHARD COUCH.

The question in the appeal was whether certain lands admittedly situated within the boundaries of Ontario belonged to that Province or to the Dominion of Canada. The appellants cut timber on the lands, which are Crown lands, without authority from the Ontario Government, which accordingly sued for an injunction and damages. The appellants justified by setting up a licence from the Dominion Government dated 1st of May, 1883. The Courts in Canada decided in favour of the Province. The order of Her Majesty in Council granting special leave to appeal provided that the Dominion should be at liberty to intervene in the appeal.

The circumstances out of which the dispute as to title arose are set out in the judgment of their Lordships.

Sir *R. E. Webster*, A.G., and *Gore*, for the Attorney-General for the Dominion.

McCarthy, Q.C. (Canada), and *Jeune*, Q.C., for the appellants.

Mowat, Q.C. (*Attorney-General for Ontario*), and *Blake*, Q.C. (Sir *Horace Davey*, Q.C., and *Haldane*, with them), for the respondents.

Sir *R. E. Webster*, A.G., and *McCarthy*, Q.C., contended that the judgment of the Supreme Court should be reversed. It lay on the respondent to make good the title of the Province to these lands. Previous to the treaty of the 3rd of October, 1873, the lands in suit, and the whole area of which they formed part, were occupied by a tribe of the Ojibbeway Indians, who by that treaty ceded the whole area in manner as therein mentioned to the Government of the Dominion. The provincial Government were no party to this treaty, and it was admitted that no surrender had been made of Indian title except to the Dominion. Reference was made to the British North America Act, 1867, sect. 91, sub-sect. 24, which gives to the Dominion exclusive legislative authority over "Indians and lands reserved for the Indians" as compared with sect. 92, sub-sect. 5, which assigns "the management and sale of public lands belonging to the Province, and of the timber and wood thereon" to the legislative authority of the Province. Also to sects. 109 and 117, and to *Attorney-General of Ontario* v. *Mercer* (1). 14 *App. Cas.* p. 48.

Documentary evidence was referred to, to shew the nature and character of the Indian title. It was contended that the effect of

(1) 8 App. Cas. 767, *ante*, p. 322.

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it was to shew that from the earliest times the Indians had, and were always recognised as having, a complete proprietary interest, limited by an imperfect power of alienation. British and Canadian legislation was referred to, to shew that such complete title had been uniformly recognised: see Royal Proclamation October 7, 1763, held by Lord Mansfield in *Campbell* v. *Hall* (1) to have the same force as a statute, under which the lands in suit were reserved to the Indians in absolute proprietary right; 43 Geo. 3, c. 138; 1 & 2 Geo. 4, c. 66; 17 Geo. 3, c. 7 (Quebec); 10 Geo. 4, c. 3 (Upper Canada); 7 Will. 4, c. 118; 2 Vict. c. 15, and 12 Vict. c. 9 (Upper Canada); 13 & 14 Vict. c. 74 (U. C.); 14 & 15 Vict. c. 51 (U. C.); 16 Vict. c. 91 (U. C.); 20 Vict. c. 26 (U. C.). The proclamation in 1763 was uniformly acted on and recognised by the Government as well as the legislature, and was regarded by the Indians as their charter. It was not superseded by the Quebec Act (14 Geo. 3, c. 83, imperial statute); but it was held by the Supreme Court of the United States to be still in force in 1823: see *Johnson* v. *McIntosh* (2). Reference was also made to *The Cherokee Nation* v. *The State of Georgia* (3) and *Worcester* v. *The State of Georgia* (4); *United States* v. *Clarke* (5); *Mitchel* v. *United States* (6); *The State of Georgia* v. *Canatoo*, reported in a note to Kent's Commentaries, vol. iii., p. 378; *Ogden* v. *Lee* (7); *Fellows* v. *Lee* (8); *Gaines* v. *Nicholson* (9); Chitty's Prerog. of the Crown, p. 29. Reference was also made to the case of *The Queen* v. *Symonds* (June, 1847), in Parliamentary Papers, 1860, vol. xlvii., p. 47 (Colonies New Zealand), where also there was said to be a report of a Select Committee of the House of Commons on the Treatment of the Aborigines in British Settlements. Also to a report in Appendix I. to Journals, House of Assembly, Canada, 1847, headed "Title to Lands and Tenure of Land."

14 *App. Cas.* p. 49.

The absolute title being in the Indians was ceded by them, subject to certain reservations for valuable consideration to the Dominion, and the treaty to that effect did not enure to the benefit of the Province in any way. The Province could not claim property in the land except by virtue of the Act of 1867, and as regards that Act the lands did not belong to the Province prior thereto within sect. 109; they were not in 1867 public property

(1) 1 Cowp. 204.
(2) 8 Wheaton, 543.
(3) 5 Peters, 1.
(4) 6 Peters, 515.
(5) 9 Peters, 168.
(6) 9 Peters, 711.
(7) 6 Hills, 546.
(8) 5 Denio, 628.
(9) 9 Howard, 356.

which the Province could retain under sect. 117; they were not public lands of the Province within sect. 92, sub-sect. 5.

Mowat, Q.C., and *Blake*, Q.C., for the respondent, contended that both before and after the treaty of 1873 the title to the lands in suit was in the Crown and not in the Indians. The lands being within the limits of the Province, the beneficial interest therein passed to the Province under the Act of 1867, and the Dominion obtained thereunder no such interest as it claims in this suit. Even if they were lands reserved for the Indians within the meaning of the Act the Dominion gained thereunder only a power of legislating in respect to them, it did not gain ownership or a right to become owner by purchase from the Indians. Under sect. 109, whether reserved to the Indians or not the land goes to the Province subject to any interest on the part of the Indians. See also sect. 108 and sect. 91, sub-sect. 9. With regard to the alleged absolute title of the Indians to which the Dominion is said to have succeeded by treaty, no such title existed on their part either as against the King of France before the conquest or against the Crown of England since the conquest. Their title was in the nature of a personal right of occupation during the pleasure of the Crown, and it was not a legal or an equitable title in the ordinary sense. For instance, the Crown made grants of land in every part of British North America both before and after the proclamation of 1763 without any previous extinguishment of the Indian claim. The grantees in those cases had to deal with the Indian claims, but the legal validity of the grants themselves was undeniably recognised both in the Canadian and the American Courts. As regards that proclamation it was argued that it was not intended to divest, and did not divest, the Crown of its absolute title to the lands, and the reservation, upon which so much argument has been rested, was expressed to last only "for the present and until Our further pleasure be known." Further, as regards the lands now in suit the proclamation was superseded by the Imperial Act of 1774, known as the Quebec Act, which added that land to the Province. It was not the intention of that Act to give to the Indians any new right over and above the interest which they possessed under the proclamation, and which was a mere licence terminable at the will of the Crown. With regard to the effect of purchases from the Indians, reference was made to *Meigs* v. *McClung's Lessee* (1) and *Clark* v. *Smith* (2).

14 *App. Cas.* p. 50.

With regard to the application of the British North American

(1) 9 Cranch, 11. (2) 13 Peters, 195.

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Act and the construction to be placed upon it, it was submitted that that Act should be on all occasions interpreted in a large, liberal, and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words. The general scheme, purpose, and intent of the Act should be borne in mind. The scheme is to create a federal union consisting of several entities. The purpose was at the same time to preserve the Provinces, not as fractions of a unit, but as units of a multiple. The Provinces are to be on an equal footing. The ownership and development of Crown lands and the revenues therefrom are to be left to the Province in which they are situated. As to legislative powers, it is the residuum which is left to the Dominion; as to proprietary rights, the residuum goes to the Provinces. Where property is intended to go to the Dominion it is specifically granted, even though legislative authority over it may already have been vested in the Dominion. It is contrary to the spirit of the Act to hold that the grant of legislative power over lands reserved for the Indians carries with it by implication a grant of proprietary right.

Sir *R. E. Webster*, A.G., replied:—

Upon the question whether the old Province of Canada had any right to the lands in suit at the date of the Act of 1867 which passed thereunder, certain legislative duties had been conferred on the province with regard to Indians, and a certain power of bargaining with regard to Indian lands; but no proprietary right had been given: see 2 Vict. c. 15 (U.C.), which was held to apply to unsurrendered lands in *The Queen* v. *Strong* (1), and *Little* v. *Keating* (2). There is a series of statutes which shews that prior to 1867 the Province had nothing but some slight legislative rights over the land: see 3 & 4 Vict. c. 35, s. 54; 12 Vict. c. 9; 13 & 14 Vict. c. 74; Cons. Stat. 22 Vict. (U.C.) c. 81; 23 Vict. c. 61, s. 54. The whole course of legislation before 1867 was that the proceeds of the Indian lands should be kept for the Indians, and not go to the Province. [LORD SELBORNE:—This is the first suggestion to that effect.] Reference was then made to the later Dominion Acts, 31 Vict. c. 42, ss. 6, 7, 8, 10, 11, especially 25; 39 Vict. c. 18; 43 Vict. c. 28. The Crown lands were dealt with by 23 Vict. c. 2; the Indian lands by 23 Vict. c. 151. Reference was made to *Vanvleck* v. *Stewart* (3); *Fegan* v. *McLean* (4), as

14 *App. Cas.* *p.* 51.

(1) Upp. Can. Rep. 1 Ch. 392.
(2) 6 Upp. Can. Rep. Q. B. (O.S.) 265.
(3) 19 Upp. Can. Rep. Q. B, 489.
(4) 29 Upp. Can. Rep. Q. B. 202.

shewing that the Indians had the right to cut and sell timber in the special reserves, and appropriate the proceeds.

The judgment of their Lordships was delivered by

LORD WATSON:—

On the 3rd of October, 1873, a formal treaty or contract was concluded between commissioners appointed by the Government of the Dominion of Canada, on behalf of Her Majesty the Queen, of the one part, and a number of chiefs and headmen duly chosen to represent the Salteaux tribe of Ojibbeway Indians, of the other part, by which the latter, for certain considerations, released and surrendered to the Government of the Dominion, for Her Majesty and her successors, the whole right and title of the Indian inhabitants whom they represented, to a tract of country upwards of 50,000 square miles in extent. By an article of the treaty it is stipulated that, subject to such regulations as may be made by the Dominion Government, the Indians are to have right to pursue their avocations of hunting and fishing throughout the surrendered territory, with the exception of those portions of it which may, from time to time, be required or taken up for settlement, mining, lumbering, or other purposes. 14 *App. Cas.* p. 52.

Of the territory thus ceded to the Crown, an area of not less than 32,000 square miles is situated within the boundaries of the Province of Ontario; and, with respect to that area, a controversy has arisen between the Dominion and Ontario, each of them maintaining that the legal effect of extinguishing the Indian title has been to transmit to itself the entire beneficial interest of the lands, as now vested in the Crown, freed from incumbrance of any kind, save the qualified privilege of hunting and fishing mentioned in the treaty.

Acting on the assumption that the beneficial interest in these lands had passed to the Dominion Government, their Crown Timber Agent, on the 1st of May, 1883, issued to the appellants, the St. Catherine's Milling and Lumber Company, a permit to cut and carry away one million feet of lumber from a specified portion of the disputed area. The appellants having availed themselves of that licence, a writ was filed against them in the Chancery Division of the High Court of Ontario, at the instance of the Queen on the information of the Attorney-General of the Province, praying—(1) a declaration that the appellants have no rights in respect of the timber cut by them upon the lands specified in their permit; (2) an injunction restraining them from trespassing on the premises and from cutting any timber

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thereon; (3) an injunction against the removal of timber already cut; and (4) decree for the damage occasioned by their wrongful acts. The Chancellor of Ontario, on the 10th of June, 1885, decerned with costs against the appellants, in terms of the first three of these conclusions, and referred the amount of damage to the Master in Ordinary. The judgment of the learned Chancellor was unanimously affirmed on the 20th of April, 1886, by the Court of Appeal for Ontario, and an appeal taken from their decision to the Supreme Court of Canada was dismissed on the 20th of June, 1887, by a majority of four of the six judges constituting the court.

Although the present case relates exclusively to the right of the Government of Canada to dispose of the timber in question to the appellant company, yet its decision necessarily involves the determination of the larger question between that government and the province of Ontario with respect to the legal consequences of the treaty of 1873. In these circumstances, Her Majesty, by the same order which gave the appellants leave to bring the judgment of the Court below under the review of this Board, was pleased to direct that the Government of the Dominion of Canada should be at liberty to intervene in this appeal, or to argue the same upon a special case raising the legal question in dispute. The Dominion Government elected to take the first of these courses, and their Lordships have had the advantage of hearing from their counsel an able and exhaustive argument in support of their claim to that part of the ceded territory which lies within the provincial boundaries of Ontario.

14 *App. Cas.* p. 53.

The capture of Quebec in 1759, and the capitulation of Montreal in 1760, were followed in 1763 by the cession to Great Britain of Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any previous time been held or acquired by the Crown of France. A royal proclamation was issued on the 7th of October, 1763, shortly after the date of the Treaty of Paris, by which His Majesty King George erected four distinct and separate Governments, styled respectively, Quebec, East Florida, West Florida, and Grenada, specific boundaries being assigned to each of them. Upon the narrative that it was just and reasonable that the several nations and tribes of Indians who lived under British protection should not be molested or disturbed in the "possession of such parts of Our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds," it is declared that no governor

or commander-in-chief in any of the new colonies of Quebec, East Florida, or West Florida, do presume on any pretence to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments, or, "until Our further pleasure be known," upon any lands whatever which, not having been ceded or purchased as aforesaid, are reserved to the said Indians or any of them. It was further declared "to be Our Royal will, for the present, as aforesaid, to reserve under Our sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of Our said three new Governments, or within the limits of the territory granted to the Hudson's Bay Company." The proclamation also enacts that no private person shall make any purchase from the Indians of lands reserved to them within those colonies where settlement was permitted, and that all purchases must be on behalf of the Crown, in a public assembly of the Indians, by the governor or commander-in-chief of the colony in which the lands lie. 14 *App. Cas.* p. 54.

The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, 1867), by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufruc-

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14 *App. Cas.* p. 55.

tuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown, a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished (1).

By an Imperial statute passed in the year 1840 (3 & 4 Vict. c. 35), the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the Province of Canada, and it was, inter alia, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united Provinces should be paid into the consolidated fund of the new Province. There was no transfer to the Province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the Province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the Province, the title still remaining in the Crown. That continued to be the right of the Province until the passing of the British North America Act, 1867. Had the Indian inhabitants of the area in question released their interest in it to the Crown at any time between 1840 and the date of that Act, it does not seem to admit of doubt, and it was not disputed by the learned counsel for the Dominion, that all revenues derived from its being taken up for settlement, mining, lumbering, and other purposes would have been the property of the Province of Canada. The case maintained for the appellants is that the Act of 1867 transferred to the Dominion all interest in Indian lands which previously belonged to the Province.

The Act of 1867, which created the Federal Government, repealed the Act of 1840, and restored the Upper and Lower

(1) Ref. *Canada* v. *Cain*, *post*, p. 634.

Canadas to the condition of separate Provinces, under the titles of Ontario and Quebec, due provision being made (sect. 142) for the division between them of the property and assets of the United Province, with the exception of certain items specified in the fourth schedule, which are still held by them jointly. The Act also contains careful provisions for the distribution of legislative powers and of revenues and assets between the respective Provinces included in the Union, on the one hand, and the Dominion, on the other. The conflicting claims to the ceded territory maintained by the Dominion and the Province of Ontario are wholly dependent upon these statutory provisions. In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

14 *App. Cas* p. 56.

Sect. 108 enacts that the public works and undertakings enumerated in Schedule 3 shall be the property of Canada. As specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the Provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for the purpose of national defence, and of "lands set apart for general public purposes." It is obvious that the enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use. The only other clause in the Act by which a share of what previously constituted provincial revenues and assets is directly assigned to the Dominion is sect. 102. It enacts that all "duties and revenues" over which the respective legislatures of the United Provinces had and have power of appropriation, "except such portions thereof as are by this Act reserved to the respective legislatures of the Provinces, or are raised by them in accordance with the special powers conferred upon them by this Act," shall form one consolidated fund, to be appropriated for the public service of Canada. The extent to which duties and revenues arising within the limits of Ontario, and over which the legislature of the old Province of Canada possessed the power of appropriation before the passing of the Act, have been transferred to the Dominion by this clause, can only be ascertained by reference to the two exceptions which it makes in favour of the new provincial legislatures.

14 *App. Cas.* p. 57.

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The second of these exceptions has really no bearing on the present case, because it comprises nothing beyond the revenues which provincial legislatures are empowered to raise by means of direct taxation for Provincial purposes, in terms of sect. 92 (2). The first of them, which appears to comprehend the whole sources of revenue reserved to the provinces by sect. 109, is of material consequence. Sect. 109 provides that "all lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." In connection with this clause it may be observed that, by sect. 117, it is declared that the Provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. A different form of expression is used to define the subject-matter of the first exception, and the property which is directly appropriated to the Provinces; but it hardly admits of doubt that the interests in land, mines, minerals, and royalties, which by sect. 109 are declared to belong to the Provinces, include, if they are not identical with, the "duties and revenues" first excepted in sect. 102.

The enactments of sect. 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under sect. 108, or might assume for the purposes specified in sect. 117 (1). Its legal effect is to exclude from the "duties and revenues" appropriated to the Dominion, all the ordinary territorial revenues of the Crown arising within the Provinces. That construction of the statute was accepted by this Board in deciding *Attorney-General of Ontario* v. *Mercer* (2), where the controversy related to land granted in fee simple to a subject before 1867, which became escheat to the Crown in the year 1871. The Lord Chan-

14 *App. Cas. p.* 58.

(1) Ref. *Maritime Bank* v. *Receiver-General*, *post*, p. 420. *Ontario Mining Company* v. *Seybold*, *post*, p. 589. *Canada* v. *Ontario*, *post*, p. 679.

(2) 8 App. Cas. 767, *ante*, p. 322.

cellor (Earl Selborne) in delivering judgment in that case, said (1): It was not disputed, in the argument for the Dominion at the bar, that all territorial revenues arising within each Province from "lands" (in which term must be comprehended all estates in land), which at the time of the union belonged to the Crown, were reserved to the respective Provinces by sect. 109; and it was admitted that no distinction could, in that respect, be made between lands then ungranted, and lands which had previously reverted to the Crown by escheat. But it was insisted that a line was drawn at the date of the union, and that the words were not sufficient to reserve any lands afterwards escheated which at the time of the union were in private hands, and did not then belong to the Crown. Their Lordships indicated an opinion to the effect that the escheat would not, in the special circumstances of that case, have passed to the Province as "lands"; but they held that it fell within the class of rights reserved to the Provinces as "royalties" by sect. 109.

Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario* v. *Mercer* (2) might have been an authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed. 14 *App. Cas.* *p.* 59.

In the course of the argument the claim of the Dominion to the ceded territory was rested upon the provisions of sect. 91 (24), which in express terms confer upon the Parliament of Canada power to make laws for "Indians, and lands reserved for the Indians." It was urged that the exclusive power of legislation and administration carried with it, by necessary implication, any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning, counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to designate

(1) 8 App. Cas. 776, *ante*, p. 330. (2) App. Cas. 767.

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certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in sect. 91 (24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

Their Lordships are, however, unable to assent to the argument for the Dominion founded on sect. 92 (24). There can be no à priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

14 *App. Cas. p.* 60.

By the treaty of 1873 the Indian inhabitants ceded and released the territory in dispute, in order that it might be opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit, "to the Government of the Dominion of Canada," for the Queen and Her successors for ever. It was argued that a cession in these terms was in effect a conveyance to the Dominion Government of the whole rights of the Indians, with consent of the Crown. That is not the natural import of the language of the treaty, which purports to be from beginning to end a transaction between the Indians and the Crown; and the surrender is in substance made to the Crown. Even if its language had been more favourable to the argument of the Dominion upon this point, it is abundantly clear that the commissioners who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario the interest which had been assigned to that province by the Imperial Statute of 1867.

These considerations appear to their Lordships to be sufficient

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for the disposal of this appeal. The treaty leaves the Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown, all revenues derivable from the sale of such portions of it as are situate within the boundaries of Ontario being the property of that Province. The fact, that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario. Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown, and the Dominion, of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government. There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing, is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the Supreme Court of Canada ought to be affirmed, and the appeal dismissed. It appears to them that there ought to be no costs of the appeal.

Solicitors for appellants: *Johnston, Harrison, & Powell.*

Solicitors for Attorney-General for Ontario: *Freshfields & Williams.*

Solicitors for Attorney-General for the Dominion: *Bompas, Bischoff, Dodgson, & Coxe.*

BRITISH COLUMBIA *v.* CANADA, 14 APP. CAS. 295. (PRECIOUS METALS CASE)

J. C.* 1888 *Nov.* 22, 23. 1889 *April* 3.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA . . . . . } APPELLANT;

AND

THE ATTORNEY-GENERAL OF CANADA . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—British North America Act, 1867, *s.* 109—*Rights of the Province to the Precious Metals—Conveyance of "Public Lands"—Construction.*

Held, that a conveyance by the Province of British Columbia to the Dominion of "public lands," being in substance an assignment of its right to

* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and LORD MACNAGHTEN.

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appropriate the territorial revenues arising therefrom, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon, and under such lands are not incidents of the land but belong to the Crown, and, under sect. 109 of the British North America Act of 1867, beneficially to the Province, and an intention to transfer them must be expressed or necessarily implied.

Appeal from a judgment of the Supreme Court of Canada (Dec. 13, 1887), confirming the judgment of a judge of the Exchequer Court of Canada upon a case stated under "The Supreme and Exchequer Court Act," and Columbian Act, 45 Vict. c. 2.

The case stated was as follows :—"The Attorney-General of Canada alleges, and the Attorney-General of British Columbia denies, that the precious metals in, upon, and under the public lands mentioned in sect. 2 of the Columbian Act 47 Vict. c. 14, are vested in the Crown as represented by the Government of Canada, and not as represented by the Government of British Columbia."

The way in which the controversy arose is stated in the judgments of their Lordships. The report of the case in the Supreme Court will be found in 14 Sup. Ct. (Canada) p. 345.

The Supreme Court decided by three judges out of five in favour of the respondent.

14 *App. Cas.* *p.* 296.

Ritchie, C.J., held that the principle applicable to the case of grants of land from the Crown to a subject was not applicable to the present case, which was not the case of a grant or conveyance at all but of a statutory transfer to the Dominion by the Province of British Columbia of the right of that Province to the public lands in question, the title to the lands remaining throughout in the Crown. He held that the expression "public lands" was sufficient to pass the interest in question. He also relied upon the wording of a British Columbia minute of the 10th of February, 1883, as shewing how the transactions in question were understood by the Provincial Government.

Gwynne, J. (Taschereau, J., consenting), agreed with the Chief Justice, and relied upon the fact that nearly the whole of the belt of territory in question consists of mountain lands which are of no value for agricultural or other surface purposes, and that the value for surface purposes of such small portion thereof as consists of land in the valleys of the mountain streams is reduced to a minimum by reason of the large powers conferred upon the mining owner as against the surface owner by the Mining Acts of British Columbia, which Acts enable the former

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to enter upon the lands of the latter, and to dispossess him upon payment of compensation, and to appropriate the water from the mountain streams, and consequently that unless the precious metals pass to the Dominion the cession is illusory and of no value.

Fournier, J., held that the transfer under which the lands in question passed to the Dominion was in effect a contract between the Queen as chief of the Executive Government of the Province, and the Queen as chief of the Executive Government of the Dominion, whom for this purpose he held to be in effect different legal persons, and that to this contract the principles enumerated in the *Earl of Northumberland's Case* (1) applied. He considered that the words "public lands" in the British Columbia Act, 47 Vict. c. 14, did not transfer the right to the precious metals on or under such lands, that in sect. 109 of the British North America Act, 1867, the words "mines and minerals" are specified in addition to lands, and he drew a distinction in this respect between those words in the 109th section of that Act, and the words "public lands" in the 91st section of the same Act, which latter words he held were used in a sense exclusive of mines and minerals. He was also of opinion that the legislative control over the lands in question would pass to the Dominion. Henry, J., based his judgment upon a previous decision of his own, in a case of *The Queen* v. *Farwell* (2) in 1886, in which he decided that the title to the lands in question was not vested in the Queen.

14 *App. Cas.* p. 297.

Sir *Horace Davey*, Q.C., *Jeune*, Q.C., and *Clay*, for the appellant, contended that this decision was erroneous. As to the prerogative right of the Crown to the precious metals found in mines reference was made to *In re Earl of Northumberland's Mines* (1), and to *Woolley* v. *Attorney-General of Victoria* (3). It is a rule of law, settled by those authorities, that this prerogative right will not pass under a grant of land by the Crown unless by apt and precise words the intention of the Crown that it should pass is expressed. By the British North America Act, 1867, sect. 109 and sect. 10 of the Order in Council (May 16, 1871), by which the Province of British Columbia was admitted into union with the Dominion of Canada, that prerogative right remained vested in the Crown on behalf of the Province.

(1) 1 Plowd. 310.

(2) This judgment will be found, together with the judgments of the Supreme Court which reversed it, in 14 Sup. Ct. (Canada) 392.

(3) 2 App. Cas. 163.

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Reference was made to British Columbian Acts 43 Vict. No. 11, and 47 Vict. c. 14. No transfer of prerogative right was effected thereby, nor by the grant in question made by the Province to the Dominion Government. That grant was in reality a grant of land to the Canadian Pacific Railway Company to aid in the construction of the railway. The lands in reference to which this question has arisen have not ceased to be part of the Province and subject to provincial legislation. Mining for gold and silver in these lands is regulated by the Provincial Gold Mining Ordinance, 1867, sects. 4 and 15, and by the Mineral Act, 1884. Under those Acts miners must be licensed by certificate of the provincial authorities. See also the Land Act, 1875, sects. 80 and 81, and Land Act, 1884, sects. 64, 65, which reserve to such miners the right to enter on lands alienated by the Crown and search therein for precious metals. This is inconsistent with an intention to transfer to the Dominion the prerogative rights of the Crown to precious metals found in provincial territory. The claim of the Dominion is in violation of British North America Act, 1867, sect. 109 : see *Attorney-General of Ontario* v. *Mercer* (1).

14 *App. Cas.* p. 298.

Rigby, Q.C., *Sedgwick*, Q.C. (Canada), and *Gore*, for the respondent, contended that the principle established by the cases in Plowden's Reports and 2 App. Cas. did not apply. This is not the case of a grant of land from the Crown to a subject. No question is involved of a grant from the Crown nor any question as between the Crown and a subject. The title to the belt of territory in question remained in the Crown after the cession by the Province to the Dominion, just the same as before the cession. The cession was made by the Queen as represented by the Province to the Queen as represented by the Dominion. Under these circumstances the expression "lands" primâ facie includes the prerogative right of the Crown to the precious metals upon and under the soil of such property. Such a right is an ordinary incident to the title to the soil on the part of the Crown. "Public lands" in sect. 92 of British North America Act, 1867, do not exclude mines and minerals upon such lands. If mines and minerals were excluded therefrom the legislative control over the sale and management thereof in the Province would not belong to the Province under sect. 92, but would be vested in the Dominion under sect. 91. This would be contrary to the case on both sides, as shewn by the whole course of pro-

(1) 8 App. Cas. 767, *ante*, p. 322.

vincial and dominion legislation since 1867. "Public lands" in sect. 92 are equivalent to the several descriptions of landed property specified in sect. 109, that is, include the precious metals. The same expression has the same meaning when used in art. 11 of the Terms of Union and in sect. 2 of British Columbian Act, 47 Vict. c. 14. Consequently the right to the precious metals in question passed to the Dominion Government, and is no longer vested in the Province.

Sir *Horace Davey*, Q.C., replied.

14 *App. Cas.* *p.* 299.

The judgment of their Lordships was delivered by

LORD WATSON :—

The question involved in this appeal is one of considerable interest to the parties, but it will be found to lie within a very narrow compass, when the facts, as to which there is no dispute, are explained.

By an Order in Council, dated the 16th of May, 1871, Her Majesty, in pursuance of the enactments of sect. 146 of the British North America Act, 1867, was pleased to ordain that the Province of British Columbia should, from the 29th day of July following, be admitted into and form part of the Dominion of Canada, subject to the provisions of that Act, and to certain Articles of Union which had been duly sanctioned by the parliaments of Canada and by the legislature of British Columbia. The eleventh of the Articles of Union is in these terms :—

"11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the union.

"And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-West Territories and the Province of Manitoba. Provided,

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14 *App. Cas.* p. 300.

that the quantity of land which may be held under pre-emption right, or by Crown grant, within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and, provided further, that until the commencement within two years, as aforesaid, from the date of the union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land so to be conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the union, the sum of $100,000 per annum, in half-yearly payments in advance."

After the union, owing to engineering and other difficulties, there was considerable delay in constructing the line of railway through British Columbia. Various differences arose between the two Governments, and these were ultimately settled, in the year 1883, by a provisional agreement, which was subsequently ratified by the respective legislatures of Canada and the Province. Part of the agreement had reference to the 11th article of Union, which it modified to the following extent. The Government of British Columbia agreed to convey to the Government of the Dominion, as therein provided, the public lands along the railway, wherever it might be finally located, to a width of 20 miles on either side of the line, and, in addition, to convey to the Dominion Government three and a half millions of acres of land in the Peace River District, in one rectangular block, east of the Rocky Mountains, and joining the North-West Territory of Canada. On the other hand, the Dominion Government undertook, with all convenient speed, to offer for sale the lands within the railway belt, on liberal terms, to actual settlers; and also to give to persons who had squatted on these lands a prior right of purchasing the lands improved, at the rates charged to settlers generally. In accordance with this agreement, the lands forming the railway belt were granted to the Dominion Government, in terms of the 11th Article of Union, by an Act of the legislature of British Columbia, 47 Vict. c. 14, s. 2.

In 1884, a controversy arose between the Dominion and the Provincial Government in regard to the gold, which had then been found to exist in considerable quantities within the forty-mile belt. With the view of judicially ascertaining which of

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them was entitled to it, a special case was adjusted, commendable for its brevity, which simply states the issue to be, whether the precious metals in, upon, and under the lands within the forty-mile belt are vested in the Crown, as represented by the Government of Canada, or as represented by the Government of British Columbia? The case was first presented to Fournier, J., in the Exchequer Court of Canada, who, without hearing parties on the merits, gave a formal judgment in favour of the Dominion. On appeal, his judgment was, after a full hearing, affirmed by a majority of the Supreme Court of Canada, consisting of Sir William Ritchie, C.J., with Taschereau and Gwynne, JJ., the dissentient members of the Court being Fournier and Henry, JJ.

14 *App. Cas.* p. 301.

It was not disputed, in the arguments addressed to this Board, that the question raised in the special case must be decided according to the principles of the law of England, which, "so far as not from local circumstances inapplicable," was extended to all parts of the Colony of British Columbia by the English Law Ordinance, 1867.

Whether the precious metals are or are not to be held as included in the grant to the Dominion Government, must depend upon the meaning to be attributed to the words "public lands" in the 11th Article of Union. The Act 47 Vict. c. 14, s. 2, which was passed in fulfilment of the obligation imposed upon the Province by that article and the agreement of 1883, defines the area of the lands, but it throws no additional light upon the nature and extent of the interest which was intended to pass to the Dominion. The obligation is to "convey" the lands, and the Act purports to "grant" them, neither expression being strictly appropriate, though sufficiently intelligible for all practical purposes. The title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province, before its admission into the federal union. Leaving the precious metals out of view for the present, it seems clear that the only "conveyance" contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues. It was neither intended that the lands should be taken out of the Province, nor that the Dominion Government should occupy the position of a freeholder within the Province. The object of the Dominion Government was to recoup the cost of constructing the railway by selling the land to settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then

14 *App. Cas.* p. 302.

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ceases to be public land, and reverts to the same position as if it had been settled by the Provincial Government in the ordinary course of its administration. That was apparently the consideration which led to the insertion, in the agreement of 1883, of the condition that the Government of Canada should offer the land for sale, on liberal terms, with all convenient speed.

According to the law of England, gold and silver mines, until they have been aptly severed from the title of the Crown, and vested in a subject, are not regarded as partes soli, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land, and the baser metals which it contains, stands upon a different title from that to which its right to the precious metals must be ascribed. In the *Mines Case* (1) all the justices and barons agreed that, in the case of the baser metals, no prerogative is given to the Crown; whereas "all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore." In British Columbia the right to public lands, and the right to precious metals in all provincial lands, whether public or private, still rest upon titles as distinct as if the Crown had never parted with its beneficial interests; and the Crown assigned these beneficial interests to the Government of the Province, in order that they might be appropriated to the same state purposes to which they would have been applicable if they had remained in the possession of the Crown. Although the Provincial Government has now the disposal of all revenues derived from prerogative rights connected with land or minerals in British Columbia, these revenues differ in legal quality from the ordinary territorial revenues of the Crown. It therefore appears to their Lordships that a conveyance by the Province of "public lands," which is, in substance, an assignment of its right to appropriate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.

14 *App. Cas.* p. 203.

The grounds upon which the majority of the learned judges of the Supreme Court decided in favour of the Dominion are briefly and forcibly stated in the judgment delivered by Sir William Ritchie, C.J. They were of opinion that the rule of construction which excepts the precious metals from a conveyance of land by the Crown to a subject has no application to the provisions of

(1) 1 Plowd. 336, 336 a.

the 11th Article of Union, which they regarded as a statutory compact between two constitutional governments. The learned Chief Justice said: "This was a statutory arrangement between the Government of the Dominion and the Government of British Columbia, in settlement of a constitutional question between the two Governments, or rather giving effect to and carrying out the constitutional compact under which British Columbia became part and parcel of the Dominion of Canada, and, as a part of that arrangement, the Government of British Columbia relinquished to the Dominion of Canada, as represented by the Governor-General, all right to certain public lands belonging to the Crown, or to the Province of British Columbia, as represented by the Lieutenant-Governor."

If the 11th Article of Union had been an independent treaty between the two Governments, which obviously contemplated the cession by the Province of all its interests in the land forming the railway belt, royal as well as territorial, to the Dominion Government, the conclusion of the Court below would have been inevitable. But their Lordships are unable to regard its provisions in that light. The 11th article does not appear to them to constitute a separate and independent compact. It is part of a general statutory arrangement, of which the leading enactment is, that, on its admission to the Federal Union, British Columbia shall retain all the rights and interests assigned to it by the provisions of the British North America Act, 1867, which govern the distribution of provincial property and revenues between the Province and the Dominion; the 11th article being nothing more than an exception from these provisions. The article in question does not profess to deal with jura regia; it merely embodies the terms of a commercial transaction, by which the one Government undertook to make a railway, and the other to give a subsidy, by assigning part of its territorial revenues (1).

14 *App. Cas.* p. 304.

Their Lordships do not think it admits of doubt, and it was not disputed at the bar, that sect. 109 of the British North America Act must now be read as if British Columbia was one of the provinces therein enumerated. With that alteration, it enacts that "all lands, mines, minerals, and royalties," which belonged to British Columbia at the time of the union, shall for the future belong to that Province and not to the Dominion. In order to construe the exception from that enactment, which is created by the 11th Article of Union, it is necessary to ascertain what is comprehended in each of the words of the enumeration,

(1) Expl. *Burrard Power Company* v. *The King*, *post*, p. 692.

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and particularly in the word "royalties." The scope and meaning of that term, as it occurs in sect. 109, underwent careful consideration in the case of *Attorney-General of Ontario* v. *Mercer* (1), which was appealed to this Board by the Dominion Government, in name of the defendant Mercer. In that case their Lordships were of opinion that the mention of "mines and minerals" in the context was not enough to deprive the word "royalties" of what would otherwise have been its proper force (2). The Earl of Selborne, in delivering the judgment of the Board, said (3): "It appears, however, to their Lordships to be a fallacy to assume that because the word 'royalties' in this context would not be regarded as inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated, lands as well as mines and minerals—even as to mines and minerals it here necessarily signifies rights belonging to the Crown jure coronæ."

14 *App. Cas. p.* 305.

It is not necessary for the purposes of this appeal to consider whether the expression "royalties," as used in sect. 109, includes jura regalia other than those connected with lands, mines, and minerals. *Attorney-General of Ontario* v. *Mercer* (4) is an authority to the effect, that, within the meaning of the clause, the word "royalties" comprehends, at least, all revenues arising from the prerogative rights of the Crown in connection with "lands," "mines," and "minerals." The exception created by the 11th Article of Union, from the rights specially assigned to the province by sect. 109, is of "lands" merely. The expression "lands" in that article admittedly carries with it the baser metals, that is to say, "mines" and "minerals," in the sense of sect. 109. Mines and minerals, in that sense, are incidents of land, and, as such, have been invariably granted, in accordance with the uniform course of Provincial legislation, to settlers who purchased land in British Columbia. But jura regalia are not accessories of land; and their Lordships are of opinion that the rights to which the Dominion Government became entitled under the 11th article did not, to any extent, derogate from the Provincial right to "royalties" connected with mines and minerals under sect. 109 of the British North America Act (5).

Their Lordships do not doubt that the 11th Article of Union might have been so expressed as to shew, by necessary implica-

(1) 8 App. Cas. 767, *ante*, p. 322.
(2) 8 App. Cas. 777, *ante*, p. 330.
(3) 8 App. Cas. 778, *ante*, p. 331.
(4) 8 App. Cas. 767, *ante*, p. 332.
(5) Ref. *Maritime Bank* v. *Receiver-General*, *ante*, p. 420.

tion, that some or all of the royalties dealt with by sect. 109 were to pass to the Dominion along with the lands constituting the railway belt. But there is not a single expression in the context which is applicable to gold or gold-mining rights. On the other hand, the whole terms of the Articles of Union, as well as of the subsequent Agreement of 1883, appear to their Lordships to point to the conclusion that the high contracting parties were dealing with public lands, in so far as these were available for the ordinary purposes of settlement, and had either excluded gold mines from their arrangements, or had them not in contemplation. It is right, however, to notice that the learned Chief Justice refers to a minute of the Council of British Columbia containing the recommendation of a committee, which was communicated to the Government of Canada, as evidencing an understanding, on the part of the Provincial Government, that mines of gold and other precious metals were to be conveyed along with the belt lands. The passage upon which the learned Chief Justice relies is in these terms:—"That it be one of the conditions that the Dominion Government, in dealing with lands in the Province, shall establish a land system equally as liberal, both as to mining and agricultural industries, as that in force in this Province at the present time, and that no delay shall take place in throwing open the land for settlement." The words "mining and agricultural industries," taken per se, might be of dubious import, because they would not disclose whether gold digging was referred to as one of the mining industries. But these industries are described as an integral part of the "land system"; and when it is considered that, at the date of the report, the system of land settlement in the Province, which included the baser metals, was regulated by special statute, and that gold mines, which were not given off to settlers, were not treated as part of that system, but were the subject of separate legislation, it becomes apparent that the Committee did not make any reference to gold in their recommendation.

14 *App. Cas.* p. 306.

Their Lordships are for these reasons of opinion that the judgment appealed from must be reversed, and that it ought to be declared that the precious metals within the railway belt are vested in the Crown, subject to the control and disposal of the Government of British Columbia, and they will humbly advise Her Majesty to that effect (1). There will be no order as to costs.

Solicitors for appellant: *Hepburn, Son, & Cutliffe.*

Solicitors for respondent: *Bompas, Bischoff, Dodgson, & Coxe.*

(1) Disc. *Esquimalt* v. *Bainbridge, post,* p. 505. *British Columbia* v. *Canada, post,* p. 779.

J. C.* 1892 MARITIME BANK *v.* RECEIVER-GENERAL [1892] A. C. 437

May 11, 12. *July* 2. THE LIQUIDATORS OF THE MARITIME BANK OF CANADA . . . . . } APPELLANTS;

AND

THE RECEIVER-GENERAL OF NEW BRUNSWICK . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867—*Relations between Crown and Provinces—Winding-up of Bank—Priority of Provincial Government over other Simple Contract Creditors—Prerogative of the Crown.*

The British North America Act, 1867, has not severed the connection between the Crown and the provinces; the relation between them is the same as that which subsists between the Crown and the Dominion in respect of the powers executive and legislative, public property and revenues, as are vested in them respectively. In particular, all property and revenues reserved to the provinces by sects. 109 and 126 are vested in Her Majesty as sovereign head of each province.

Held, affirming a judgment of the Supreme Court of Canada, that the provincial government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada in respect of public moneys of the province deposited in the name of the Receiver-General of the province, is entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attaches.

Appeal from a judgment of the Supreme Court of Canada (Dec. 14, 1889), affirming a judgment of the Supreme Court of New Brunswick (Oct. 19, 1888) upon a special case submitted.

Two questions were raised by the case, the material facts in which are stated in the judgment of their Lordships: first, was the provincial government entitled to payment in full by preference over the noteholders of the bank; second, if not, was the provincial government entitled to payment in full over the other depositors and simple contract creditors of the bank.

[1892] *A. C. p.* 438. The first Court answered both questions in favour of the provincial government. The second Court decided the first question by a majority in favour of the appellants, by reason of the provisions of the 79th section of the Bank Act (Revised Statutes of Canada, c. 120). It decided the second question in favour of the respondent, holding in effect that the prerogative rights of the Crown could be invoked and

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

exercised by and on behalf of the provincial government, which was, therefore, entitled to the priority claimed.

The Attorney-General (Sir *R. Webster*), *Stockton*, Q.C. (of the New Brunswick bar), and *R. Brown*, for the appellants:—

The prerogative rights of the Crown cannot be invoked and exercised by the provincial government, as distinguished from the Dominion Government. There is no section in the British North America Act of 1867 which gives this Crown right to the province. Accordingly, if the province possesses that right it must be on the general principle that the Lieutenant-Governor is entitled to exercise the prerogative of the Crown. But the effect of the Act of 1867 is that the Dominion Government represents the four provinces existing at the time of the Union and other provinces which were thereafter to be constituted; and, consequently, the direct connection between the Crown and the provinces has ceased. The Governor-General of Canada is the real representative of the Crown as the Dominion is at present constituted; and the Lieutenant-Governor of each province is not. Certain portions of prerogative are given to the Lieutenant-Governors, and that is inconsistent with their representing the Crown entirely. Otherwise, if the Dominion and the provinces both possess full prerogative rights you might have the Crown as representing the one contending with the Crown as representing the other. The judgment of Gwynne, J., in the Supreme Court was read and the reasoning therein contained adopted, it being suggested that sect. 92 of the Act should have been more emphatically relied on. Reference was also made to *Reg.* v. *Bank of Nova Scotia* (1); *Exchange Bank of Canada* v. *The Queen* (2); *Mercer* v. *Attorney-General of Ontario* (3); *St. Catherine's Milling and Lumber Company* v. *The Queen.* (4) If the province as constituted under the Act of 1867 possesses all the rights which existed in the government of the colony before the Act, it is admitted that then it would have the same right of priority as the government had before the Act. But if the scheme of that Act was, as contended by the appellants, to establish a local executive and legislature under a lieutenant-governor who is appointed by the Governor-General, and not by the Queen, with functions different from the old government and legislature, and with powers limited and defined by statute and municipal in their general character, there is no reason why they should possess all the privileges and preroga-

[1892] *A. C.* p. 439.

(1) 11 Sup. Ct. Rep. 1.
(2) 11 App. Cas. 157, *ante*, p. 365.
(3) 5 Sup. Ct. Rep. 538; S. C. 8 App. Cas. 767, *ante*, p. 322.
(4) 14 App. Cas. 46, *ante*, p. 390.

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tives as claimed, to be exercised concurrently, and sometimes it may be in conflict with, the government of the Dominion.

LIQUIDATORS OF THE MARITIME BANK OF CANADA v. RECEIVER-GENERAL OF NEW BRUNSWICK.

Sir *H. Davey*, Q.C., *Blair*, Q.C. (*Attorney-General for New Brunswick*), and *Ingle Joyce*, for the respondent:—

Sect. 64 of the British North America Act of 1867 enacts that "the constitution of the executive authority in each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it existed at the Union until altered under the authority of this Act." Before the Act of 1867 each provincial government exercised the prerogatives of the Crown. They are reserved to them by the Act. Sects. 64 and 65 read together mean that the powers and authorities vested in and exercised by the provincial government at the time of the Union should continue. These powers cannot be cut down except by express enactment, and there is nothing either in the Act of 1867 or in any subsequent Act which abolishes or alters them. According to the true effect of that Act the provincial governments and legislatures are within their respective spheres supreme. They are not made in any way subordinate to the legislature and government of the Dominion. The intention was that the Dominion and the provinces should have co-ordinate authority within their respective spheres, all subject to the control of the Imperial Parliament. Sect. 72 provides that Lieutenant-Governors should appoint their councils in the Queen's name, and fill up vacancies therein in the same way (sect. 75). Further, the provincial legislatures are summoned in the name of the Queen (sect. 82). Reference was also made to sects. 3 and 5 and to 109 and 126 of the Act of 1867; to *Hodge* v. *The Queen* (1); *Powell* v. *Apollo Candle Company* (2); *Théberge* v. *Laudry*. (3)

[1892] *A. C.* p. 440.

Stockton, Q.C., replied.

1892. July 2. The judgment of their Lordships was delivered by

LORD WATSON:—

This appeal is brought by special leave in a suit which followed upon a case submitted for the opinion of the Supreme Court of the province of New Brunswick, by the appellants, the liquidators of the Maritime Bank of the Dominion of Canada, in the interest of unsecured creditors of the bank, on the one side, and by the Receiver-

(1) 9 App. Cas. 117, *ante*, p. 333. (2) 10 App. Cas. 282.
(3) 2 App. Cas. 102.

General of the Province, claiming to represent Her Majesty, on the other. The only facts which it is necessary to refer to are these: that the bank carried on its business in the city of St. John, New Brunswick; and that, at the time when it stopped payment in March, 1887, the provincial government was a simple contract creditor for a sum of $35,000, being public moneys of the province deposited in the name of the Receiver-General. The case, as originally framed, presented two questions for the decision of the Court; but, owing to the condition of the bank's assets, the first of these has ceased to be of practical importance, and it is only necessary to consider the second, which is in these terms: "Is the provincial government entitled to payment in full over the other depositors and simple contract creditors of the bank?"

The Supreme Court of New Brunswick unanimously, and, on appeal, the Supreme Court of Canada with a single dissentient voice, have held that the claim of the provincial government is for a Crown debt to which the prerogative attaches, and therefore answered the question in the affirmative.

The Supreme Court of Canada had previously ruled, in *Reg.* v. *Bank of Nova Scotia* (1), that the Crown, as a simple contract creditor for public moneys of the Dominion deposited with a provincial bank, is entitled to priority over other creditors of equal degree. The decision appears to their Lordships to be in strict accordance with constitutional law. The property and revenues of the Dominion are vested in the Sovereign, subject to the disposal and appropriation of the legislature of Canada; and the prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain. In *Exchange Bank of Canada* v. *The Queen* (2), this Board disposed of the appeal on that footing, although their Lordships reversed the judgment of the Court below and negatived the preference claimed by the Dominion Government upon the ground that, by the law of the province of Quebec, the prerogative was limited to the case of the common debtor being an officer liable to account to the Crown for public moneys collected or held by him. The appellants did not impeach the authority of these cases, and they also conceded that, until the passing of the British North America Act, 1867, there was precisely the same relation between the Crown and the province which now subsists between the Crown and the Dominion. But they maintained that the effect of the statute has been to sever all connection between the Crown and the provinces; to make the government of the Dominion the only government of Her Majesty in North

[1892] *A. C.* *p.* 441.

(1) 11 Sup. Ct. Rep. 1. (2) 11 App. Cas. 157, *ante*, p. 365.

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America; and to reduce the provinces to the rank of independent municipal institutions. For these propositions, which contain the sum and substance of the arguments addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority.

Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act. In *Hodge* v. *The Queen* (1), Lord Fitzgerald, delivering the opinion of this Board, said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion." The Act places the constitutions of all provinces within the Dominion on the same level; and what is true with respect to the legislature of Ontario has equal application to the legislature of New Brunswick.

[1892] *A. C.* p. 442.

It is clear, therefore, that the provincial legislature of New

(1) 9 App. Cas. 117, *ante*, p. 346.

Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by sect. 92 of the Act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share.

[1892] *A. C.* *p.* 443.

In asking their Lordships to draw that inference from the terms of the statute, the appellants mainly, if not wholly, relied upon the fact that, whereas the Governor-General of Canada is directly appointed by the Queen, the Lieutenant-Governor of a province is appointed, not by Her Majesty, but by the Governor-General, who has also the power of dismissal. If the Act had not committed to the Governor-General the power of appointing and removing Lieutenant-Governors, there would have been no room for the argument, which, if pushed to its logical conclusion, would prove that the Governor-General, and not the Queen, whose Viceroy he is, became the sovereign authority of the province whenever the Act of 1867 came into operation. But the argument ignores the fact that, by sect. 58, the appointment of a provincial governor is made by the "Governor-General in Council by Instrument under the Great Seal of Canada," or, in other words, by the Executive Government of the Dominion, which is, by sect. 9, expressly declared "to continue and be vested in the Queen." There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown. The act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.

The point raised in this appeal, as to the vesting or non-vesting of the public property and revenues of each province in the Sovereign as supreme head of the State, appears to their Lordships to be practically settled by previous decisions of this Board.

The whole revenues reserved to the provinces for the purposes of provincial government are specified in sects. 109 and 126 of the Act.

[1892] *A. C.* *p.* 444.

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The first of these clauses deals with "all lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union," which it declares "shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise." If the Act had operated such a severance between the Crown and the provinces, as the appellants suggest, the declaration that these territorial revenues should "belong" to the provinces would hardly have been consistent with their remaining vested in the Crown. Yet, in *Attorney-General of Ontario* v. *Mercer* (1); *St. Catherine's Milling and Lumber Company* v. *The Queen* (2); and *Attorney-General of British Columbia* v. *Attorney-General of Canada* (3), their Lordships expressly held that all the subjects described in sect. 109, and all revenues derived from these subjects, continued to be vested in Her Majesty as the sovereign head of each province. Sect. 126, which embraces provincial revenues other than those arising from territorial sources, and includes all duties and revenues raised by the provinces in accordance with the provisions of the Act, is expressed in language which favours the right of the Crown, because it describes the interest of the provinces as a right of appropriation to the public service. And, seeing that the successive decisions of this Board, in the case of territorial revenues, are based upon the general recognition of Her Majesty's continued sovereignty under the Act of 1867, it appears to their Lordships that, so far as regards vesting in the Crown, the same consequences must follow in the case of provincial revenues which are not territorial.

Being of opinion that the decisions of both Courts below were sound, and agreeing with the reasons assigned by the learned judges, their Lordships will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss the appeal. The appellants must pay to the respondent his costs of this appeal.

Solicitors for appellants: *Linklater & Co.*
Solicitors for respondent: *Field, Roscoe, & Co.*

(1) 8 App. Cas. 767, *ante*, p. 332. (2) 14 App. Cas. 46, *ante*, p. 420.
(3) 14 App. Cas. 295, *ante*, p. 412.

WINNIPEG *v.* BARRETT [1892] A. C. 445.

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July 12, 13, 14, 30.

CITY OF WINNIPEG . . . . . APPELLANT;

AND

BARRETT . . . . . RESPONDENT

ON APPEAL FROM THE SUPREME COURT OF CANADA.

CITY OF WINNIPEG . . . . . APPELLANT;

AND

LOGAN . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA.

Law of Canada—Province of Manitoba—Dominion Statute, 33 *Vict.* c. 3—*Manitoba Public Schools Act*, 1890—*Denominational Schools—Powers of Provincial Legislature.*

According to the true construction of the Constitutional Act of Manitoba, 1870, 33 Vict. c. 3 (Dominion Statute), having regard to the state of things which existed in Manitoba at the date thereof, the legislature of that province did not exceed its powers in passing the Public Schools Act, 1890.

Sect. 22 of the Act of 1870 authorizes the provincial legislature exclusively to make laws in relation to education so as not to "prejudicially affect any right or privilege with respect to denominational schools which any class of persons have, by law or practice in the province, at the Union":—

Held, that the Act of 1890, which abolished the denominational system of public education established by law since the Union, but which did not compel the attendance of any child at a public school, or confer any advantage in respect of attendance other than that of free education, and at the same time left each denomination free to establish, maintain, and conduct its own schools, did not contravene the above proviso; and that accordingly certain by-laws of a municipal corporation which authorized assessments under the Act were valid.

Appeal in the first case from a judgment of the Supreme Court (Oct. 28, 1891), reversing one of the Court of Queen's Bench for Manitoba (Feb. 2, 1891); in the second case from a judgment of the Court of Queen's Bench (Dec. 19, 1891), which followed that of the Supreme Court.

The province of Manitoba joined the Union in 1870, upon the

* *Present*:—LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

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terms of the Constitutional Act of Manitoba, 1870, 33 Vict. c. 3 (Dominion Statute). Sect. 22 is the material section, and is set out in their Lordships' judgment. In 1890 the provincial legislature passed two statutes relating to education—chaps. 37 and 38—the latter of which is intituled "The Public Schools Act, 1890." Its validity was the subject of this appeal.

The facts are stated in the judgment of their Lordships.

In the first case the application was for a summons to shew cause why the by-laws in question, which were passed under the Act for levying a rate for school and municipal purposes in the city of Winnipeg, should not be quashed for illegality on the ground that the amounts levied for Protestant and Roman Catholic schools were therein united, and that one rate was levied upon Protestants and Catholics alike for the whole sum, in a manner which but for the Act of 1890 would have been invalid, according to the Education Acts thereby repealed.

Killam, J., dismissed the summons, holding that the rights and privileges referred to in the Dominion Statute were those of maintaining denominational schools, of having children educated in them, and of having inculcated in them the peculiar doctrine of the respective denominations. He regarded the prejudice effected by the imposition of a tax upon Catholics for schools to which they were conscientiously opposed as something so indirect and remote that it was not within the Act.

The Court of Queen's Bench affirmed this order. Taylor, C.J., and Bain, J., held that "rights and privileges" included moral rights, and that whatever any class of persons was in the habit of doing in reference to denominational schools should continue, and not be prejudicially affected by provincial legislation, but that none of those rights and privileges had been in any way affected by the Act of 1890. Dubree, J., dissented, holding that the right or privilege existing at the Union was the right of each denomination to have its denominational school, with such teaching as it might think fit, and the privilege of not being compelled to contribute to other schools of which members of such denomination could not in conscience avail themselves; and that the Act of 1891 invaded such privilege, and was consequently ultra vires.

[1892] *A. C.* *p.* 447.

The Supreme Court reversed the order.

Ritchie, C.J., held that as Catholics could not conscientiously continue to avail themselves of the public schools as carried on under the system established by the Public Schools Act, 1890, the effect of that Act was to deprive them of any further beneficial use of the system of voluntary Catholic schools which had been established before the Union, and had thereafter been carried on under the

State system introduced in 1871. Patterson, J., pointed out that the words "injuriously affect" in sect. 22, sub-sect. 1, of the Manitoba Constitutional Act, would include any degree of interference with the rights or privileges in question, although falling short of the extinction of such rights or privileges. He held that the impediment cast in the way of obtaining contributions to voluntary Catholic denominational schools by reason of the fact that all Catholics would under the Act be compulsorily assessed to another system of education amounted to an injurious affecting of their rights and privileges within the meaning of the sub-section. Fournier, J., pointed out that the mere right of maintaining voluntary schools if they chose to pay for them, and of causing their children to attend such schools, could not have been the right which it was intended to reserve to Catholics or other classes of persons by the use of the word "practice," since such right was undoubtedly one enjoyed by every person or class of persons by law, and took a similar view to that taken by Patterson, J. Taschereau, J., gave judgment in the same sense, holding that the contention of the appellants gave no effect to the word "practice" inserted in the section.

In the second case a similar application was made by the respondent Logan, and allowed in consequence of the Supreme Court's decision in Barrett's case.

Sir *H. Davey*, Q.C., *McCarthy*, Q.C., and *Campbell* (both of the Canadian bar), for the appellant, contended that the view taken by Killam, J., Taylor, C.J., and Bain, J., was correct. The Act of 1890 did not affect any right or privilege with respect to denominational schools which the respondent or any class of persons had by law or practice in the province prior to the Union. It established one system of public schools throughout the province, and abolished all the laws regarding public schools which had theretofore been passed and were then existing. Sects. 21 and 22, sub-sects. 1, 2, and 3, of the Manitoba Act, 1870, were referred to, and the various affidavits which had been made in the case, and it was contended that the Act of 1890 was not ultra vires. It enacted that all public schools in the province are to be free schools (sect. 5); that all religious exercises therein shall be conducted according to the regulation of the advisory board which is provided by sect. 6; but in case the guardian or parent of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then the pupil need not attend. All public schools are non-sectarian, and no religious exercises are allowed, except as provided by the Act, which, moreover, is not compulsory.

[1892] *A. C.* *p.* 448.

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With regard to the state of things, "law or practice" in Manitoba prior to the Union, the law then in force was the law of England, as it existed at the date of the Hudson's Bay Company's charter, viz. the 2nd of May, 1670, in so far as applicable. Accordingly, the respondent had not, nor had the Roman Catholics of the province, any right or privilege by law in relation to the Roman Catholic denominational schools. The only right and privilege on this subject which they possessed was, as shewn by the affidavits, the privilege to establish and maintain private schools which were supported by fees paid by the parents or guardians of the children who attended them, supplemented, it may be, by those who belonged to the Roman Catholic Church. The Act of 1890 does not interfere with or prejudicially affect this right; for the respondent and Roman Catholics are still entitled to establish and maintain denominational schools as before the Union. Consequently it has not been shewn that the Act interferes with any rights and privileges which were locally enjoyed within the city.

Reference was made to *Ex parte Renaud* (1); *Fearon* v. *Mitchell* (2). In the other appeal, the respondent Logan represented members of the Church of England, whose rights and privileges were similar to those of Barrett and his co-religionists.

[1892] *A. C.* *p.* 449.

Sir *Richard Webster*, A.G., *Blake*, Q.C., and *Ewart*, Q.C. (both of the Canadian bar), and *Gore*, for the respondent Barrett:—

The Act of 1890 prejudicially affects the rights and privileges of Roman Catholics in the province, as they existed by law or practice at the date of the Union, with respect to denominational schools. By its operation they are deprived of the system of Roman Catholic denominational schools as they existed before the Union. The public schools constituted by the Act are, or may be, Protestant denominational schools, and Catholic ratepayers are compelled to contribute thereto. They cannot conscientiously permit their children to attend the schools established by the Act, and, having regard to the compulsory rate levied upon them in support thereof, material impediments are cast in the way both of subscribing and of obtaining subscriptions in support of Catholic denominational schools, and of setting up and maintaining the same. The rights and privileges of Catholics are, accordingly, prejudicially affected. At the date of the Union there was not, and there never had been, any State system of education in Manitoba, nor was there any compulsory rate

(1) 1 Pugsley N. B. R. 273. (2) Law Rep. 7 Q. B. 690.

or State grant for purposes of education. There was, however, an established and recognised system of voluntary denominational education, including Roman Catholic schools supported in part by voluntary contributions from Catholics and contributed by the Roman Church. In a similar way, the Church of England and various Protestant sects supported their own schools. The provincial legislature established by the Dominion Statute of 1870, passed 34 Vict. c. 12, establishing a State system of education in the province. Subsequent Acts were passed, and the whole were codified by 44 Vict. c. 4; and modification was made therein by 45 Vict. cc. 8 and 11; 46 & 47 Vict. c. 46; 47 Vict. cc. 37 and 54; 48 Vict. c. 27; 50 Vict. cc. 18 and 19; 51 Vict. c. 31; 52 Vict. cc. 5 and 21; all which Acts shew that useful education can be provided without disturbing rights and privileges as they existed in 1870. Then came the Act complained of. Besides the establishment of public schools, controlled as to religious teaching by an advisory board, sect. 179 abolished pre-existing Catholic school districts, and provided that all the assets of such Catholic schools should belong to, and all the liabilities thereof should be paid by, the public school districts established by the new Act. The right and privilege which had been prejudicially affected was the right to have a religious education conducted under the supervision of their Church, administered in the schools which they were compelled to support; to have the immunity existing in 1870, from being compelled to support schools to which they objected. Their interests were prejudiced in being compelled by the Act to support one set of schools while, as a matter of religion and conscience, they would, at the same time, have to establish another set of schools to which alone they could send their children. The new public schools, controlled ultimately by a majority of ratepayers, would be conducted for the benefit of Protestant and Presbyterian denominations, and Catholics would thereby be prejudiced and injured. It was contended that *Fearon* v. *Mitchell* (1) had no bearing on the case. See *Musgrave* v. *Inclosure Commissioners* (2), and *Barlow* v. *Ross* (3), where the existence of rights and privileges is discussed. In *Ex parte Renaud* (4) the head-note is wrong. It was not decided that no legal privilege existed in that case, but merely that it had not been infringed.

[1892] *A. C.* p. 450.

A. J. Ram, for the respondent Logan.

McCarthy, Q.C., replied.

(1) Law Rep. 7 Q. B. 690.
(2) Law Rep. 9 Q. B. 162.
(3) 24 Q. B. D. 381.
(4) 1 Pugsley N. B. R. 273.

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[1892] *A. C.* *p.* 451.

The judgment of their Lordships was delivered by—

LORD MACNAGHTEN :—

These two appeals were heard together. In the one case the city of Winnipeg appeals from a judgment of the Supreme Court of Canada reversing a judgment of the Court of Queen's Bench for Manitoba; in the other from a subsequent judgment of the Court of Queen's Bench for Manitoba following the judgment of the Supreme Court. The judgments under appeal quashed certain by-laws of the city of Winnipeg which authorized assessments for school purposes in pursuance of the Public Schools Act, 1890, a statute of Manitoba to which Roman Catholics and members of the Church of England alike take exception. The views of the Roman Catholic Church were maintained by Mr. Barrett; the case of the Church of England was put forward by Mr. Logan. Mr. Logan was content to rely on the arguments advanced on behalf of Mr. Barrett; while Mr. Barrett's advisers were not prepared to make common cause with Mr. Logan, and naturally would have been better pleased to stand alone.

The controversy which has given rise to the present litigation is, no doubt, beset with difficulties. The result of the controversy is of serious moment to the province of Manitoba, and a matter apparently of deep interest throughout the Dominion. But in its legal aspect the question lies in a very narrow compass. The duty of this Board is simply to determine as a matter of law whether, according to the true construction of the Manitoba Act, 1870, having regard to the state of things which existed in Manitoba at the time of the Union, the provincial legislature has or has not exceeded its powers in passing the Public Schools Act, 1890.

Manitoba became one of the provinces of the Dominion of Canada under the Manitoba Act, 1870, which was afterwards confirmed by an Imperial Statute known as the British North America Act, 1871. Before the Union it was not an independent province, with a constitution and a legislature of its own. It formed part of the vast territories which belonged to the Hudson's Bay Company, and were administered by their officers or agents.

The Manitoba Act, 1870, declared that the provisions of the British North America Act, 1867, with certain exceptions not material to the present question, should be applicable to the province of Manitoba, as if Manitoba had been one of the provinces originally united by the Act. It established a legislature for Manitoba, consisting of a legislative council and a legislative assembly, and proceeded, in sect. 22, to re-enact with some modifications the provisions with

[1892] *A. C.* *p.* 452.

regard to education which are to be found in sect. 93 of the British North America Act, 1867. Sect. 22 of the Manitoba Act, so far as it is material, is in the following terms:—

"In and for the province, the said legislature may exclusively make laws in relation to education, subject and according to the following provisions:

"(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the Union."

Then follow two other sub-sections. Sub-sect. 2 gives an "appeal," as it is termed in the Act, to the Governor-General in Council from any act or decision of the legislature of the province, or of any provincial authority "affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." Sub-sect. 3 reserves certain limited powers to the Dominion Parliament, in the event of the provincial legislature failing to comply with the requirements of the section, or the decision of the Governor-General in Council.

At the commencement of the argument a doubt was suggested as to the competency of the present appeal, in consequence of the so-called appeal to the Governor-General in Council provided by the Act. But their Lordships are satisfied that the provisions of sub-sects. 2 and 3 do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country.

Sub-sects. 1, 2, and 3 of sect. 22 of the Manitoba Act, 1870, differ but slightly from the corresponding sub-sections of sect. 93 of the British North America Act, 1867. The only important difference is that in the Manitoba Act, in sub-sect. 1, the words "by law" are followed by the words "or practice," which do not occur in the corresponding passage in the British North America Act, 1867. These words were no doubt introduced to meet the special case of a country which had not as yet enjoyed the security of laws properly so called. [1892] *A. C.* *p.* 453. It is not perhaps very easy to define precisely the meaning of such an expression as "having a right or privilege by practice." But the object of the enactment is tolerably clear. Evidently the word "practice" is not to be construed as equivalent to "custom having the force of law." Their Lordships are convinced that it must have been the intention of the legislature to preserve every legal right or privilege, and every benefit or advantage in the nature of a right or privilege, with respect to denominational schools, which any class of persons practically enjoyed at the time of the Union.

What then was the state of things when Manitoba was admitted

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to the Union? On this point there is no dispute. It is agreed that there was no law or regulation or ordinance with respect to education in force at the time. There were, therefore, no rights or privileges with respect to denominational schools existing by law. The practice which prevailed in Manitoba before the Union is also a matter on which all parties are agreed. The statement on the subject by Archbishop Taché, the Roman Catholic Archbishop of St. Boniface, who has given evidence in Barrett's case, has been accepted as accurate and complete.

"There existed," he says, "in the territory now constituting the province of Manitoba a number of effective schools for children.

"These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church and others by various Protestant denominations.

"The means necessary for the support of the Roman Catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attend the schools, and the rest was paid out of the funds of the Church, contributed by its members.

"During the period referred to, Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in or control over the schools of Roman Catholics. There were no public schools in the sense of State schools. The members of the Roman Catholic Church supported the schools of their own Church for the benefit of Roman Catholic children, and were not under obligation to, and did not contribute to, the support of any other schools."

[1892] *A. C.* *p.* 454.

Now, if the state of things which the archbishop describes as existing before the Union had been a system established by law, what would have been the rights and privileges of the Roman Catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body, which was engaged in a similar work at the time of the Union, would have had precisely the same right with respect to their denominational schools. Possibly this right, if it had been defined or recognised by positive enactment, might have had attached to it as a necessary or appropriate incident the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their Lordships' opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools

that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other. It has been objected that if the rights of Roman Catholics, and of other religious bodies, in respect of their denominational schools, are to be so strictly measured and limited by the practice which actually prevailed at the time of the Union, they will be reduced to the condition of a "natural right" which "does not want any legislation to protect it." Such a right, it was said, cannot be called a privilege in any proper sense of the word. If that be so, the only result is that the protection which the Act purports to extend to rights and privileges existing "by practice" has no more operation than the protection which it purports to afford to rights and privileges existing "by law." It can hardly be contended that, in order to give a substantial operation and effect to a saving clause expressed in general terms, it is incumbent upon the Court to discover privileges which are not apparent of themselves, or to ascribe distinctive and peculiar features to rights which seem to be of such a common type as not to deserve special notice or require special protection.

[1892] *A. C.* p. 455.

Manitoba having been constituted a province of the Dominion in 1870, the provincial legislature lost no time in dealing with the question of education. In 1871 a law was passed which established a system of denominational education in the common schools, as they were then called. A board of education was formed, which was to be divided into two sections, Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Under the Manitoba Act the province had been divided into twenty-four electoral divisions, for the purpose of electing members to serve in the legislative assembly. By the Act of 1871 each electoral division was constituted a school district in the first instance. Twelve electoral divisions, "comprising mainly a Protestant population," were to be considered Protestant school districts; twelve, "comprising mainly a Roman Catholic population," were to be considered Roman Catholic school districts. Without the special sanction of the section there was not to be more than one school in any school district. The male inhabitants of each school district, assembled at an annual meeting, were to decide in what manner they should raise their contributions towards the support of the school in addition to what was derived from public funds. It is perhaps not out of place to observe that one of the modes prescribed was "assessment on the property of the school district," which must have involved, in some cases at any rate, an assessment on Roman Catholics for the support of a Protestant school, and an assessment on Protestants for the support

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of a Roman Catholic school. In the event of an assessment, there was no provision for exemption, except in the case of the father or guardian of a school child—a Protestant in a Roman Catholic school district or a Roman Catholic in a Protestant school district—who might escape by sending the child to the school of the nearest district of the other section, and contributing to it an amount equal to what he would have paid if he had belonged to that district.

The laws relating to education were modified from time to time. But the system of denominational education was maintained in full vigour until 1890. An Act passed in 1881, following an Act of 1875, provided, among other things, that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and a Roman Catholic district might include the same territory in whole or in part. From the year 1876 until 1890, enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school or a Roman Catholic ratepayer for a Protestant school.

In 1890 the policy of the past nineteen years was reversed; the denominational system of public education was entirely swept away. Two Acts in relation to education were passed. The first (53 Vict. c. 37) established a department of education, and a board consisting of seven members, known as the "Advisory Board." Four members of the board were to be appointed by the Department of Education, two were to be elected by the public and high school teachers, and the seventh member was to be appointed by the University Council. One of the powers of the advisory board was to prescribe the forms of religious exercises to be used in the schools.

The Public Schools Act, 1890 (53 Vict. c. 38), enacted that all Protestant and Roman Catholic school districts should be subject to the provisions of the Act, and that all public schools should be free schools. The provisions of the Act with regard to religious exercises are as follows:—

"6. Religious exercises in the public schools shall be conducted according to the regulations of the advisory board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises take place.

"7. Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and upon receiving written authority from the trustees it shall be the duty of the teachers to hold such religious exercises.

"8. The public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided."

The Act then provides for the formation, alteration, and union of school districts, for the election of school trustees, and for levying a rate on the taxable property in each school district for school purposes. In cities the municipal council is required to levy and collect upon the taxable property within the municipality such sums as the school trustees may require for school purposes. A portion of the legislative grant for educational purposes is allotted to public schools; but it is provided that any school not conducted according to all the provisions of the Act, or any Act in force for the time being, or the regulations of the Department of Education, or the advisory board, shall not be deemed a public school within the meaning of the law, and shall not participate in the legislative grant. Sect. 141 provides that no teacher shall use or permit to be used as text-books any books except such as are authorized by the advisory board, and that no portion of the legislative grant shall be paid to any school in which unauthorized books are used. Then there are two sections (178 and 179) which call for a passing notice, because, owing apparently to some misapprehension, they are spoken of in one of the judgments under appeal as if their effect was to confiscate Roman Catholic property. They apply to cases where the same territory was covered by a Protestant school district and by a Roman Catholic district. In such a case Roman Catholics were really placed in a better position than Protestants. Certain exemptions were to be made in their favour if the assets of their district exceeded its liabilities, or if the liabilities of the Protestant school district exceeded its assets. But no corresponding exemptions were to be made in the case of Protestants.

[1892] *A. C.* p. 457.

Such being the main provisions of the Public Schools Act, 1890, their Lordships have to determine whether that Act prejudicially affects any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the Union.

Notwithstanding the Public Schools Act, 1890, Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the province; they are free to maintain their schools by school fees or voluntary subscriptions; they are free to conduct their schools according to their own religious tenets without molestation or interference. No child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend. But then it is said that it is impossible for Roman Catholics, or for members of the Church of England (if their views are correctly represented by the Bishop of Rupert's Land,

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who has given evidence in Logan's case), to send their children to public schools where the education is not superintended and directed by the authorities of their Church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault. It is owing to religious convictions which everybody must respect, and to the teaching of their Church, that Roman Catholics and members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.

Their Lordships are sensible of the weight which must attach to the unanimous decision of the Supreme Court. They have anxiously considered the able and elaborate judgments by which that decision has been supported. But they are unable to agree with the opinion which the learned judges of the Supreme Court have expressed as to the rights and privileges of Roman Catholics in Manitoba at the time of the Union. They doubt whether it is permissible to refer to the course of legislation between 1871 and 1890, as a means of throwing light on the previous practice or on the construction of the saving clause in the Manitoba Act. They cannot assent to the view, which seems to be indicated by one of the members of the Supreme Court, that public schools under the Act of 1890 are in reality Protestant schools. The legislature has declared in so many words, that "the public schools shall be entirely unsectarian," and that principle is carried out throughout the Act.

[1892] *A. C.* *p.* 459.

With the policy of the Act of 1890 their Lordships are not concerned. But they cannot help observing that, if the views of the respondents were to prevail, it would be extremely difficult for the provincial legislature, which has been entrusted with the exclusive power of making laws relating to education to provide for the educational wants of the more sparsely inhabited districts of a country almost as large as Great Britain, and that the powers of the legislature, which on the face of the Act appear so large, would be limited to the useful but somewhat humble office of making regulations for the sanitary conditions of school-houses, imposing rates for the support of denominational schools, enforcing the compulsory attendance of scholars, and matters of that sort.

In the result their Lordships will humbly advise Her Majesty that these appeals ought to be allowed with costs (1). In the *City of Winnipeg*

(1) Dist. *Brophy* v. *Manitoba*, *post*, p. 457.

v. *Barrett* it will be proper to reverse the order of the Supreme Court with costs, and to restore the judgment of the Court of Queen's Bench for Manitoba. In the *City of Winnipeg* v. *Logan* the order will be to reverse the judgment of the Court of Queen's Bench, and to dismiss Mr. Logan's application, and discharge the rule nisi and the rule absolute with costs.

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Solicitors for the city of Winnipeg: *Freshfields & Williams.*
Solicitors for Barrett: *Bompas, Bischoff & Co.*
Solicitors for Logan: *Harrison & Powell.*

TENNANT *v.* UNION BANK OF CANADA [1894] A. C. 31;

J. C.* 1892 *July* 21, 22, 23. 1893 *July* 26, 29; *Dec.* 9.

[PRIVY COUNCIL.]

TENNANT . . . . . PLAINTIFF;

AND

THE UNION BANK OF CANADA . . . DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

British North America Act, s. 91, *sub-s.* 15; *s.* 92, *sub-s.* 13—*Validity of Dominion Bank Act* (46 *Vict. c.* 120)—*Negotiability of Warehouse Receipts—Construction.*

Although warehouse receipts granted to itself by a firm which has not the custody of any goods but its own are not negotiable instruments within the meaning of the Mercantile Amendment Act (c. 122 of the Revised Statutes), *held*, that the Dominion Bank Act (46 Vict. c. 120), while it was in force dispensed with that limitation, validated such receipts, and transferred to the indorsees thereof the property comprised therein:—

Held, further, that the Bank Act was intrà vires of the Dominion Parliament.

Sect. 91, sub-sect. 15, of the British North America Act, 1867, gives to that parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with property and civil rights in the province (see sect. 92, sub-sect. 13), and confers upon a bank privileges as a lender which the provincial law does not recognise.

The legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sect. 91, is of paramount authority even though it trenches upon the matters assigned to the provincial legislature by sect. 92.

Cushing v. *Dupuy* (5 App. Cas. 409) followed.

Appeal from a decree of the Court of Appeal (Jan. 8, 1892), affirming a decree of the Chancellor of the province (June 4, 1890) which dismissed the appellant's action with costs.

* *Present at the first argument:*—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and MR. SHAND. *Present at the second argument:*—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.

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The facts and proceedings are stated in the judgment of their Lordships. The question in controversy was as to the validity of the warehouse receipts therein mentioned for the purpose of creating and passing title to the goods comprised therein. In the Courts below the course of judicial opinion was as follows: The Chancellor held that the dealings in question had been substantially between the insolvents and the bank direct, and not between the bank and Peter Christie as a principal. He held that under the Dominion Bank Act Peter Christie, as the indorser of the warehouse receipts, was the agent of the insolvents within the meaning of the Act, and as such could transfer a valid title to the bank by re-indorsing such receipts to them.

In appeal, Hagarty, C.J., held that, apart from the receipts, the bank acquired a valid title by virtue of the agreement of October, 1887; and that the receipts gave a valid title apart from such agreement.

Osler, J.A., held that the receipts were valid under the Dominion statute on the ground that the insolvents, as mill-owners, were within sect. 54 of the Act, and that, as they were given in pursuance of a provision to that effect at the time the advances were made, they came within the saving clause of sect. 53.

Maclennan, J.A., held that by virtue of the agreement of October 1887, Peter Christie acquired an equitable interest in the lumber as soon as the advances were made. The receipt of the 17th of November, 1888, was valid under the Dominion Act, and it was immaterial under the Act whether it passed to the bank direct from the insolvents or through the intervention of Peter Christie. Besides, the receipts gave a valid title apart from either the provincial or the Dominion statutes.

Burton, J.A., dissented. He held that the dealings in question were between the bank and Peter Christie, and not between the bank and the insolvents; that the receipt of the 12th of July, 1888, was not a warehouse receipt within the meaning of the Bank Act, because the logs therein mentioned were not and did not purport to be then warehoused or stored in any place, but were in transit. Even if it were a warehouse receipt within the meaning of the Act, it could only be valid on the assumption that Peter Christie, as stated therein, was the owner of the goods covered by it, which was not the case. As regards the later receipts, no promise to the bank to grant receipts made contemporaneously with the advances was proved either in the case of Peter Christie or of the insolvents. He held that Peter Christie did not acquire under the Ontario Act any property under the receipts, and consequently could not transfer any

to the Bank, not being an agent of the insolvents within the meaning of sect. 53, sub-sect. 3, of the Bank Act.

M'Carthy, Q.C. (of the Canadian bar), and *Gore*, for the appellant, contended that, as pointed out in the judgment of Burton, J.A., the counsel for the bank had at the trial expressly stated that they claimed title under the Bank Act, and not under the agreement of the 1st of October, 1887, or otherwise, and therefore could not on appeal be allowed to set up a different case. Their title, if any, depended on the provisions of the Bank Act, and not otherwise. There was no evidence of any dealing either between the bank and the insolvents, or between the bank and Peter Christie, such as would entitle the bank to rely on any of the receipts as having been given in pursuance of any promise made to the bank contemporaneously with any advances. The so-called warehouse receipts were not such within the meaning either of the Ontario Act or the Bank Act. On the true construction of the Ontario Act Peter Christie acquired no title to the goods by virtue of those receipts, and whether he did so or not he could not pass title to the bank. Reference was made to sects. 53 and 54 of the Bank Act, and it was contended that thereunder the bank had no right to retain the property in suit against the appellant. Such sections should be strictly construed, because the authority to transfer property by receipts of this description is in contravention of the general law against secret conveyances and works great hardship upon creditors who give credit in ignorance of their existence: see c. 125 of the Revised Statutes. This c. 125 applies to all warehouse receipts which do not come strictly within the terms of the Bank Act; and under it there must be change of possession or registration to validate an assignment. See *Todd* v. *Liverpool and London Globe Insurance Company* (1); *Bank of British North America* v. *Clarkson* (2). Warehouse receipt does not, under the Bank Act, mean a receipt given to the owner of the goods by himself. Further, the provisions of sects. 53 and 54 were ultrà vires the Dominion Parliament. This point had not been argued in the Courts below, having been concluded as regards the Courts of the colony by *Merchants' Bank of Canada* v. *Smith* (3), which held that the Dominion Banking Act, 1871 (34 Vict. c. 5), s. 46, was within the powers of that Parliament.

[1894] *A. C.* p. 33.

[1894] *A. C.* p. 34.

Robinson, Q.C. (of the Canadian bar), *Symons* with him, for the

(1) 18 Upper Canada (N.S.) C. P. 192; S. C., 20 Upper Canada (N.S.) C. P. 523.
(2) 19 Upper Canada (N.S.) C. P. 182.
(3) 8 Sup. Ct. Can. Rep. 512, affirming a decision in the same case reported in 8 Ontario Appeals, 15.

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respondents, was first heard as to the merits on the assumption that the Bank Act was valid:—

It was contended that the appellant could have no better right of action, in respect of the matters complained of, than the insolvents had. These latter could not be heard to allege that the receipts were defective in form and to impeach their validity. They were under contract to give warehouse receipts valid within the meaning of the Bank Act or otherwise, and could be compelled to perform their agreement. The receipts in question were authorized by the Bank Act, and the bank had a valid title as indorsee thereof to the property in suit. So far as the Dominion Act was at variance with the Ontario Mercantile Amendment Act (see sect. 14, et seq. of the latter) the Dominion Act must prevail. But even apart from the Bank Act the respondent was entitled. The agreement of the 1st of October, 1887, continued as a binding contract after the payment of the claim of the Federal Bank. The insolvents and Peter Christie were both bound by it. Under it Peter Christie had a valid lien on the property in suit, and the benefit of that lien passed to the bank. With regard to the Chattel Mortgages Act cited on the other side (i.e., c. 125), it does not apply to an equitable right, which this is if not within the Bank Act. Reference was made to *Clarkson* v. *Ontario Bank* (1); *Lumsden* v. *Scott* (2); *Burland* v. *Moffatt* (3); *Banks* v. *Robinson* (4); *Coyne* v. *Lee* (5); *Holroyd* v. *Marshall* (6); *Brown* v. *Bateman* (7); *Citizens Insurance Company* v. *Parsons* (8); *Merchants' Bank* v. *Smith* (9); *Reeve* v. *Whitmore* (10); *Federal Bank of Canada* v. *Canadian Bank of Commerce* (11); *In re Colman* (12); *Dominion Bank* v. *Davidson* (13).

[1894] *A. C. p. 35.*

M'Carthy, Q.C., replied, referring to *Bank of Toronto* v. *Perkins* (14); *McAllister* v. *Forsyth* (15).

The case then stood over till the 26th of July, 1893, when the second argument took place, limited to the question whether sects. 53 and 54 of the Bank Act were ultrà vires the Dominion Parliament.

M'Carthy, Q.C., and *Gore*, contended that they were so:—

The onus was on the other side to shew that this Act was authorized

(1) 15 Ontario Appeals, 166.
(2) 4 Ontario Rep. 323.
(3) 11 Sup. Ct. Rep. 76.
(4) 15 Ont. Rep. 618, 623.
(5) 14 Ontario Appeals, 503.
(6) 10 H. L. C. 191.
(7) Law Rep. 2 C. P. 272.
(8) 4 Sup. Ct. Can. 215.
(9) 8 Sup. Ct. Can. 512.
(10) 33 L. J. (Ch.) 63.
(11) 13 Sup. Ct. Can. 384, 394.
(12) 36 Upper Canada, 559, 581.
(13) 12 Ontario App. 90.
(14) 8 Sup. Ct. Can. 603.
(15) 12 Sup. Ct. Can. 1.

by the terms of sect. 91 of the British North American Act, 1867: see *L'Union St. Jacques de Montréal* v. *Bélisle* (1). The real question is whether the provisions in dispute are admissible under the head of banking, or whether they relate to property and civil rights in the province. It was contended that they came within art. 13 of sect. 92. Reference was made to *Citizens Insurance Company* v. *Parsons* (2); *Merchants' Bank* v. *Smith* (3). See also *Quirt* v. *The Queen* (4); *Reg.* v. *Robertson* (5); *Pigeon* v. *Recorder's Court and City of Montreal* (6).

Sects. 91 and 92 must be read together, and the power of the Dominion Parliament in regard to banking operations must be so exercised as not to interfere with property and civil rights in the province. Regulations with regard to the validity and effect of warehouse receipts clearly relate to property and civil rights. They are not negotiable instruments in favour of private lenders by the law of the province, and it was not the intention of sect. 91 to authorize privileges being conferred on banks which are not recognised by the provincial law. The same objection would not apply to disabilities being imposed on banks in comparison with private lenders, for it would not be to the same extent an interference with property and civil rights.

[1894] *A. C.* p. 36.

Reference was also made to *Cushing* v. *Dupuy* (7); *Clarkson* v. *Ontario Bank* (8); *Hodge* v. *The Queen* (9); *Colonial Building Association* v. *Attorney General of Quebec* (10).

Sir *Horace Davey*, Q.C., and *Robinson*, Q.C. (of the Canadian bar), for the respondent, contended that the provisions of the Bank Act were within the powers of the Dominion Parliament. They related strictly to banking operations, and were intended to protect and facilitate advances by bankers to their customers by authorizing loans on warehouse receipts. The subject of the enactment is reserved exclusively to the parliament of the Dominion by sect. 91, and even if the subject can also be brought within any of the sub-sections of sect. 92, still the power of the Dominion is paramount: see *Cushing* v. *Dupuy* (7). The power exercised in this case was never questioned till 1880, in *Smith* v. *Merchants' Bank of Canada* (11).

With regard to the documents called warehouse receipts, they

(1) Law Rep. 6 P. C. 31, *ante*, p. 206.
(2) 7 App. Cas. 96, *ante*, p. 267.
(3) 8 Sup. Ct. Can. 512; S.C., 1 Cart. 828; 8 Ontario App. Rep. 15.
(4) 19 Sup. Ct. Can. 510.
(5) 6 Sup. Ct. Can. 52, 55.
(6) 17 Sup. Ct. Can. 495.
(7) 5 App. Cas. 409, *ante*, p. 253.
(8) 15 Ontario App. Rep. 166.
(9) 9 App. Cas. 117, *ante*, p. 333.
(10) 9 App. Cas. 157, *ante*, p. 349.
(11) 28 Grant, 629; 8 Ont. App. 15; 8 Sup. Ct. Can. 512.

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were first authorized by a Canadian statute in 1859 (22 Vict. c 20), which applied both to banks and individuals. Then came the Act of 1867, sect. 91 of which assigned to the exclusive jurisdiction of the Dominion Parliament the subjects of the regulation of trade and commerce, banking, incorporation of banks, bills of exchange, and promissory notes. Since that Act the validity and effect of such instruments, in connection with banks, has been dealt with by the Dominion Parliament. As regards individuals, the same instruments have been regulated by the provincial legislature: see statutes of Canada, 24 Vict. c. 23, 29 Vict. c. 19: Dominion Acts, 31 Vict. c. 11, 33 Vict. c. 11, 34 Vict. c. 5, 43 Vict. c. 22; and Revised Statutes of Ontario (1877), c. 116, and (1887), c. 122.

[1894] *A. C.* p. 37.

M'Carthy, Q.C., replied.

1893. Dec. 9. The judgment of their Lordships was delivered by

LORD WATSON:—

Christie, Kerr & Co., saw-millers and lumberers at Bradford, in the Province of Ontario, became insolvent in April, 1889. The Union Bank of Canada, respondents in this appeal, subsequently took possession of and removed a quantity of lumber which was stored in the yard of the firm at Bradford. This action was brought against the respondents in December, 1889, for damages in respect of their alleged conversion of the lumber, by Mickle, Dyment & Son, personal creditors of the insolvent firm, in the name of James Tennant, as assignee or trustee of the firm's estate, by whom they were duly authorized to sue, in his name, for their own exclusive use and benefit.

Christie, Kerr & Co., to whom it may be convenient to refer as the firm, had a timber concession in the county of Simcoe, where, according to the course of their business, the pine wood was felled and cut into logs, which were marked with the letters "C. K.," the initials of the firm. The logs were then conveyed, chiefly by water, to their mill at Bradford, where they were sawn and stored for sale.

In order to obtain funds for carrying on their trade during the season of 1888, the firm, in October 1887, entered into a written agreement with Peter Christie, son of Alexander Christie, its senior partner, who agreed to advance the money necessary upon receiving a lien by way of security upon all the timber cut or manufactured by the firm. On the other hand, the firm undertook to do everything that was necessary in order to make such lien effectual, and for that purpose to execute any documents which might be required.

In pursuance of that agreement promissory notes were granted by

Peter Christie, which the Federal Bank of Canada discounted under an arrangement by which they were to receive warehouse receipts covering all the timber belonging to the firm. Peter Christie assigned to the bank all right and benefit which he had under the agreement of October, 1887. The course of dealing with the bank was, that the firm granted warehouse receipts to themselves, which they indorsed to Peter Christie, by whom they were indorsed to the bank. [1894] *A. C.* *p.* 38.

The Federal Bank went into liquidation in June, 1888, at which date their advances amounted to about $50,000. In order to meet the claim of the liquidator, Alexander Christie applied for accommodation to the respondents, who agreed to give it upon terms which were arranged between him and Mr. Buchanan, their manager. The agreement was verbal; and its terms, which are of considerable importance in this case, appear from the following statements made by Alexander Christie in the course of his evidence, which are substantially corroborated by Mr. Buchanan, and are nowhere contradicted: "That we and Peter Christie should give his notes, that Christie, Kerr & Co. and A. R. Christie should indorse them, and that there should be a warehouse receipt covering all the logs that they had, and the lumber that was to be manufactured from them." "The intention was to give the security of the logs and of the lumber as it was manufactured." "We were to give them a receipt at once upon the whole of the logs, and as the logs progressed we made a continuation to where they were." "Warehouse receipts were to be furnished until the debt was paid."

There was not, as in the case of the Federal Bank, any assignment to the respondents of Peter Christie's rights under the agreement of October, 1887. It is clear, from the account which he gives of the transaction, that Alexander Christie dealt with the respondents as the representative of his firm, and also as representing his son Peter, from whom he held a power of attorney. Peter Christie took no part, personally, in any of the transactions, either with the Federal Bank or with the respondents. From first to last, so far as his interests were concerned, all arrangements were made and all documents connected with them, whether promissory notes or warehouse receipts, were executed and subscribed by his father, on his behalf.

Upon the faith of the agreement the respondents made advances to the amount of $52,600 upon promissory notes of Peter Christie, indorsed to them by his attorney and also by the firm. On the 20th of June, 1888, they received a warehouse receipt for 70,000 pine saw logs, marked "C. K.," which were described as then stored in the Lakes St. Jean and Couchiching, en route to Bradford mill. These logs represented the whole pine timber which had been cut for [1894] *A. C.* *p.* 39.

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transportation to Bradford during the season of 1888; and as they arrived at their destination, and were sawn up, fresh receipts were given to the respondents, containing a description of the timber in its manufactured state. Portions of the lumber were from time to time sold by the firm, with the consent of the respondents, and the proceeds applied in reduction of their advances.

The last of the series of receipts deposited as security with the respondents is dated the 1st of January, 1889, by which time all the logs covered by the first receipt of the 20th of June, 1888, had reached Bradford, and had been converted into lumber. It includes the whole of the timber forming the original subject of the security which then remained unsold and in the possession or custody of the firm. Though not in precisely the same form as the rest, it may be taken as a specimen, because it was not contended that the differences of form were material. It runs thus:—

"The undersigned acknowledges to have received from Christie Kerr and Company, owners of the goods, wares and merchandise herein mentioned, and to have now stored in the premises known as the Bradford sawmill yard, adjoining the village of Bradford, in the county of Simcoe, the following goods, wares and merchandise, viz.:— Five millions eight hundred and fifty-three thousand nine hundred and twenty-four feet of lumber, one hundred and ninety-three thousand of shingles, all marked 'C. K.,' and manufactured during season 1888 out of saw logs cut in the townships of Oakley and Hindon, and transported to Bradford mill and cut there, which goods, wares and merchandise are to be delivered pursuant to the order of the said Peter Christie to be indorsed hereon, and are to be kept in store till delivered pursuant to such order."

[1894] *A. C.* *p.* 40.

"This is intended as a warehouse receipt within the meaning of the statute of Canada, intituled 'An Act relating to Banks and Banking,' and the amendments thereto, and within the meaning of all other Acts and laws under which a bank of Canada may acquire a warehouse receipt as a security."

This receipt was, like its predecessors, signed by the firm, and by them indorsed to Peter Christie, and was then indorsed on his behalf by Alexander Christie, and delivered to the respondents.

It is not matter of dispute that the timber of which the respondents took possession, after the insolvency of the firm, was included, either as saw logs or as lumber, in all the receipts which they received as security. But it does not appear to their Lordships that these receipts could be regarded as negotiable instruments carrying the property of the timber if their effect depended upon the provisions of the Mercantile Code which is contained in the Revised Statutes of Ontario, 1887.

The Mercantile Amendment Act (c. 122 of the Revised Statutes) deals with warehouse receipts and other mercantile documents which are effectual to transmit the property of goods without actual delivery. That statute not only recognises the negotiability of warehouse receipts by custodiers who are not the owners of the goods; it extends the privilege to receipts by one who is both owner and custodier, but that only in cases where the grantor of the receipt is, from the nature of his trade or calling, a custodier for others as well as himself and therefore in a position to give receipts to third parties. The receipts in question do not comply with the requirements of the Act, because it is neither averred nor proved, that the firm, in the course of their business, had the custody of any goods except their own.

It may also be noticed that c. 125 of the Revised Statutes enacts that when goods are transferred by way of conveyance or mortgage, possession being retained by the transferor, the deed of conveyance or mortgage, if not duly registered, shall be absolutely null and void as against creditors of the grantor or mortgagor.

In these circumstances, certain provisions of the Bank Act, which was passed by the legislature of the Dominion (46 Vict. c. 120) and is specially referred to in the receipts held by the respondents, become important. Although now repealed, the Act was in force during the whole period of these transactions; and, if competently enacted, its provisions must, in so far as they are applicable, govern the rights of parties in this litigation.

[1894] *A. C.* *p.* 41.

Sect. 45 provides that the bank shall not, either directly or indirectly, lend money or make advances upon the security or pledge of any goods, wares, or merchandise except as authorized by the Act.

Sect 53, sub-sect. 2, authorizes the bank to acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favour in the course of its banking business. The document so acquired vests in the bank "all the right and title of the previous holder or owner thereof, or of the person from whom such goods wares or merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of such goods wares or merchandise." Sub-sect. 3 of the same clause provides that if the previous holder of such warehouse receipt or bill of lading is the agent of the owner, the bank shall be vested with all the right and title of the owner, subject to his right to have the goods re-transferred to him upon payment of the debt for which they are held in security by the bank.

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Sect. 54, which deals specially with the case of the custodier and owner of the goods being one and the same person enacts that:—

"If any person who grants a warehouse receipt or a bill of lading is engaged in the calling, as his ostensible business, of keeper of a yard, cove, wharf or harbour, or of warehouseman, miller, saw-miller, maltster, manufacturer of timber, wharfinger, master of a vessel, or other carrier by land or by water, or by both, curer or packer of meat, tanner, dealer in wool or purchaser of agricultural produce, and is at the same time the owner of the goods, wares and merchandise mentioned in such warehouse receipt or bill of lading, every such warehouse receipt or bill of lading, and the right and title of the bank thereto and to the goods, wares and merchandise mentioned therein, shall be as valid and effectual as if such owner, and the person making such warehouse receipt or bill of lading, were different persons."

[1894] *A. C.* *p.* 42.

These enactments go beyond the provisions of sect. 16 of the Mercantile Amendment Act. They omit the limitation of the provincial statute, which requires, in order to validate a warehouse receipt by a custodier who is also owner, that the trade or calling in which he is ostensibly engaged must be one which admits of his granting receipts on behalf of other owners whose goods are in his possession.

The Chancellor of Ontario dismissed the suit with costs; and the Court of Appeal affirmed his decision. Upon the evidence before them, all the learned judges, with one exception, came to the conclusion that the transaction was substantially one between the firm and the respondents, and that Peter Christie's position was really that of an intermediary; and consequently that the respondents had a right, against the firm, to demand and receive warehouse receipts for the timber in security for their advances. Burton, J.A., was of opinion that the respondents must be held to have dealt with Peter Christie alone; that the receipts in his hands were not valid either according to provincial law or under the provisions of the Bank Act, and that his indorsation could not pass any interest in the timber to the respondents.

In the view which he took of the real character of the transaction, the Chancellor held that the receipts were effectual, mainly on the ground that Peter Christie, in indorsing them, ought to be regarded as the agent of the firm within the meaning of sect. 53, sub-sect. 3, of the Bank Act. Hagarty, C.J., and Maclennan, J., who with Osler, J., constituted the majority of the Appeal Court, held that the receipts, having been given directly to the respondents by the firm, under an obligation to that effect, were made effectual by the provisions of the Bank Act. They also held that, assuming the receipts not to be within the protection of the Bank Act, Peter

Christie had, as between himself and the firm, an equitable lien on the timber which passed to the respondents; and also that they had the same rights against the trustee of the insolvent firm as they had against the firm itself. Osler, J., whilst agreeing that the respondents dealt directly with the firm, examined the case on the contrary hypothesis, and held that, even in that view, the receipts were validated by the Bank Act, and carried the property of the timber to the respondents. [1894] *A. C.* *p.* 43.

In the Courts below, the appellant pleaded that the provisions of the Bank Act with respect to warehouse receipts, in so far as they differ from the provisions of the Mercantile Amendment Act, were ultrà vires of the Dominion Legislature. The plea was not discussed, because it was admittedly at variance with the decision of the Supreme Court of Canada in *Merchants' Bank of Canada* v. *Smith* (1), which was a precedent binding on provincial tribunals. The case was therefore disposed of by the Chancellor and the Appeal Court upon the footing that the provisions of the Bank Act were not open to challenge.

At the first hearing of this appeal, the whole points arising in the case were fully and ably argued by counsel, with the exception of the plea taken by the appellant against the validity of the Dominion Act. Further discussion at the time was prevented by the *Labrador Case*, which had been specially set down for the consideration of a full Board.

Their Lordships, having considered the argument which had been addressed to them, came to the conclusion that the majority of the learned judges were right in holding that, notwithstanding the form of the documents by which it was carried out, the arrangement made in June, 1888, by Alexander Christie and Mr. Buchanan was one between the respondents and the firm, as well as between them and Peter Christie.

It does not admit of doubt that the advances obtained from the bank were intended to be for the use and benefit of the firm. Although the promissory notes were signed by his father as representing Peter Christie, it is clear that they were signed for the accommodation of the firm, and that, in any question between him and the firm, Peter Christie was a mere surety. In a question with the respondents he was, no doubt, the primary debtor; but the firm, as indorsers of the promissory notes, were also under a direct liability to the respondents, for which security might be given. And it is a material circumstance that the evidence of Alexander Christie, which has already been cited, is only consistent with the view that the firm undertook to give the respondents the security of the timber. The whole course of dealing between the parties is also consistent with [1894] *A. C.* *p.* 44.

(1) 8 Sup. Ct. Can. 512; 1 Cart. 828.

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that view. The advances appear to have been paid over to the firm, and the warehouse receipts for the timber to have been delivered by the firm to the respondents; and it does not appear that either the money or the receipts ever passed or were intended to pass into the possession of Peter Christie.

Their Lordships also came to the same conclusion with the majority of the learned judges, that, assuming the provisions of the Bank Act to be intrà vires, the receipts in question were such as the firm could give and the respondents could lawfully receive. The obvious effect of sect. 54 is that, for the purposes of the Bank Act, a warehouse receipt by an owner of goods who carries on, as the firm did, the trade of a saw-miller, is to be as effectual as if it had been granted by his bailee, although his business may be confined to the manufacture of his own timber. That enactment plainly implies that such a receipt is to be valid, not only in the hands of the bank, but in the hands of a borrower who gives it to the bank in security of a loan. Their Lordships do not think that the provisions of sect. 53, sub-sect. 2, which are somewhat obscure, can be held to cut down the plain enactments of sect. 54, especially in a case where the grantor of the receipt himself delivers it to the bank as a security for his own debt.

It seems clear that the firm, so long as they were solvent, could not have refused to make delivery of all the timber in their possession to the respondents, although the legal ownership was still with the firm. But on that assumption, and assuming also that their trustee had no higher right than the insolvents, the question remains whether a creditor having an assignment from the trustee could plead the nullity enacted by c. 125 of the Revised Statutes. Their Lordships, before dealing with these questions, thought it expedient to determine for themselves whether the provisions of the Bank Act, to which the appellant takes exception, were competently enacted.

[1894] *A. C. p.* 45.

The appellant's plea against the legislative power of the Dominion Parliament was accordingly made the subject of further argument; and, the point being one of general importance, their Lordships had the advantage of being assisted, in the hearing and consideration of it, by the Lord Chancellor and Lord Macnaghten. The question turns upon the construction of two clauses in the British North America Act, 1867. Sect. 91 gives the Parliament of Canada power to make laws in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the legislatures of the provinces, and also exclusive legislative authority in relation to certain enumerated subjects, the fifteenth of which is "Banking, Incorporation of Banks, and the Issue of Paper Money." Sect. 92 assigns to each provincial legislature the exclusive right to make laws in relation to the classes of subjects therein enumerated; and the

thirteenth of the enumerated classes is "Property and Civil Rights in the Province."

Statutory regulations with respect to the form and legal effect, in Ontario, of warehouse receipts and other negotiable documents, which pass the property of goods without delivery, unquestionably relate to property and civil rights in that province; and the objection taken by the appellant to the provisions of the Bank Act would be unanswerable if it could be shewn that, by the Act of 1867, the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislature by sect. 92. But sect. 91 expressly declares that, "notwithstanding anything in this Act," the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in sect. 91, are "Patents of Invention and Discovery," and "Copyrights." It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces.

This is not the first occasion on which the legislative limits laid down by sects. 91 and 92 have been considered by this Board. In *Cushing* v. *Dupuy* (1) their Lordships had before them the very same question of statutory construction which has been raised in this appeal. An Act relating to bankruptcy, passed by the Parliament of Canada, was objected to as being ultrà vires, in so far as it interfered with property and civil rights in the province; but, inasmuch as "bankruptcy and insolvency" form one of the classes of matters enumerated in sect. 91, their Lordships upheld the validity of the statute. In delivering the judgment of the Board, Sir Montague Smith pointed out that it would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property (2).

[1894] A. C. p. 46.

The law being so far settled by precedent, it only remains for consideration whether warehouse receipts, taken in security by a bank in the course of the business of banking, are matters coming within the class of subjects described in sect. 91, sub-sect. 15, as "Banking, Incorporation of Banks, and the Issue of Paper Money." If they are, the provisions made by the Bank Act with respect to

(1) 5 App. Cas. 409, *ante*, p. 253.
(2) Appl. *Ontario* v. *Canada*, *post*, p. 491. Expl. *Grand Trunk Railway* v. *Canada*, *post*, p. 638.

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such receipts are intrà vires. Upon that point their Lordships do not entertain any doubt. The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the province does not, and cannot, attach to it. It also comprehends "banking," an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker.

The appellant's counsel hardly ventured to dispute that the lending of money on the security of goods, or of documents representing the property of goods, was a proper banking transaction. Their chief contention was that, whilst the legislature of Canada had power to deprive its own creature, the bank, of privileges enjoyed by other lenders under the provincial law, it had no power to confer upon the bank any privilege as a lender which the provincial law does not recognise. It might enact that a security, valid in the case of another lender, should be invalid in the hands of the bank, but could not enact that a security should be available to the bank which would not have been effectual in the hands of another lender. It was said in support of the argument, that the first of these things did, and the second did not, constitute an interference with property and civil rights in the province. It is not easy to follow the distinction thus suggested. There must be two parties to a transaction of loan; and, if a security, valid according to provincial law, was made invalid in the hands of the lender by a Dominion statute, the civil rights of the borrower would be affected, because he could not avail himself of his property in his dealings with a bank.

[1894] *A. C.* *p.* 47.

But the argument, even if well founded, can afford no test of the legislative powers of the Parliament of Canada. These depend upon sect. 91, and the power to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights in the province. And it appears to their Lordships that the plenary authority given to the Parliament of Canada by sect. 91, sub-sect. 15, to legislate in relation to banking transactions is sufficient to sustain the provisions of the Bank Act which the appellant impugns.

On these grounds, their Lordships have come to the conclusion that the judgments appealed from ought to be affirmed, and they will humbly advise Her Majesty to that effect. The appellant must bear the costs of this appeal.

Solicitors for appellant: *Harrison & Powell.*
Solicitors for respondents: *Freshfields & Williams.*

ONTARIO *v.* CANADA [1894] A. C. 189 (VOLUNTARY ASSIGNMENTS CASE)

J. C.*
1893
Dec. 12, 13.
1894
Feb. 24.

THE ATTORNEY-GENERAL OF ONTARIO . PLAINTIFF;

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

British North America Act, 1867, *ss.* 91, 92—*Powers of Local Legislation Enactment ancillary to Bankruptcy Law—Revised Statutes of Ontario, c.* 124, *s.* 9.

Held, that the provisions of sect. 9 of Ontario "Act respecting assignments and preferences by insolvent persons" (Revised Statutes of Ontario, c. 124), which relate to assignments purely voluntary, and postpone thereto judgments and executions not completely executed by payment, are merely ancillary to bankruptcy law, and as such are within the competence of the provincial legislature so long as they do not conflict with any existing bankruptcy legislation of the Dominion Parliament.

Appeal from a judgment of the Court of Appeal (May 9, 1893) upon a question referred to them by the Lieut.-Governor of Ontario, under Ontario Act (53 Vict. c. 13), "as to the jurisdiction of the legislature of Ontario to enact sect. 9 of the Revised Statutes of Ontario, 1887, c. 124, entitled 'An Act respecting Assignments and Preferences by Insolvent Persons.'"

The Court, composed of Hagarty, C.J., Burton, Osler, Macclennan, JJ.A., answered by a majority that the section was not within the powers of the provincial legislature.

The case is reported in 20 Ontario Appeals, p. 489. Sect. 9 is set out in the judgment of their Lordships.

Edward Blake, Q.C. (Canadian bar), *Haldane*, Q.C., and *Bray*, for the appellant:—

The effect of sect. 9 is merely to prevent a first execution creditor from securing a preference over other creditors; that is, it takes away or modifies the privileges of execution creditors. It is contended, and not seriously disputed, that to do so is within the competence of the provincial legislature as being within more than one of the enumerations in sect. 92 of the British North America Act, 1867, viz., "property and civil rights," "administration of justice," "procedure

* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, LORD SHAND, and SIR RICHARD COUCH.

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in civil cases," and "local and private matters." The question is whether sect. 91, under the head of "bankruptcy and insolvency," effects a withdrawal of the subject of this clause from the provincial legislature. The presumption, at all events, is in favour of the validity of the impugned Act: see *Valin* v. *Langlois* (1). With regard to the withdrawal of provisional legislative authority by sect. 91, art. 21, it was contended, first, that the clause did not necessarily fall within the meaning of bankruptcy and insolvency; second, that until the Dominion Parliament has actually legislated on that subject, the powers of the provincial legislature, as exercised in this case, are not affected by the existence of general powers in the Dominion Parliament which that parliament has not thought fit to exercise. In other words, the Dominion Parliament might have authority to override the legislation of the province; but until it does so the latter stands good as being within its powers.

Before 1867 the legislation on the subject of this Ontario Act was contained in an Act of the late Province of Canada, 22 Vict. c. 96 (see especially sects. 18, 19, and 21), and in the Consolidated Statutes of Upper Canada of 1859, c. 26 (see sect. 18). The Dominion Parliament has not altered that legislation. It passed an Act respecting insolvency in 1875 (see 38 Vict. c. 16), and repealed it in 1880 (see 43 Vict. c. 1); and since 1880 there has been no Dominion legislation on the subject of bankruptcy, or on the subject of the impugned clause 9 of the Ontario Act. The provincial legislature, on the other hand, has dealt with this subject: see Revised Statutes of Ontario, 1877, c. 118, "An Act respecting fraudulent preference of creditors by persons in insolvent circumstances," sect. 2 of which re-enacted sect. 18 of Consol. Stats. c. 26, which itself was a re-enactment of sect. 19 of 22 Vict. c. 96. [Reference was also made to Ontario Act, 47 Vict. c. 10, s. 3; 48 Vict. c. 26, preamble; amended by 49 Vict. c. 25, and by 50 Vict. c. 19.] Then came the Act in question in this case, c. 124 of the Revised Statutes of 1887, which re-enacted 48 Vict. c. 26, with its amendments. In its turn the Act of 1887 has been amended four times, but sect. 9 has remained untouched.

[1894] *A. C.* *p.* 191.

It was accordingly contended that the earlier sections of the impugned Act were merely re-enactments without change of principle of the original legislation of the Province of Canada; that the remaining sections, including sect. 9, relate to such procedure as is necessary to carry out the first object of a voluntary assignment, viz., to ensure amongst creditors a fair distribution of assets without undue preference. The clauses do not apply to insolvent persons only; they do not compel an insolvent to make an assignment. They do

(1) 5 App. Cas. 115, *ante*, p. 247.

not enable a debtor to obtain a discharge from the obligation of any contract or from any liability. It was contended that, strictly speaking, they were not bankruptcy or insolvency provisions within the meaning of art. 21 of sect. 91. They are confined to prescribing procedure and the legal resulting consequences of an assignment if made. The action of the debtor is left optional and voluntary, so that the coercive legislation of bankruptcy is avoided.

Ontario Act 43 Vict. c. 10, first abolished priority amongst execution creditors, and established a procedure whereby the sheriff held for the benefit of creditors claiming within a prescribed period rateably. That Act has never been disputed, and in the absence of Dominion legislation on the same subject cannot be disputed. The present Act merely carries out the same principle.

With regard to judicial decision, there has been no case in which the validity of sect. 9 has been considered apart from the whole Act. The Act of 48 Vict. c. 26, of which the Act impugned in this case is a re-enactment, has been several times questioned, with the result that the Courts of First Instance have decided in favour of its validity, and the Court of Appeal, being equally divided, has not reversed their decision: see *Broddy* v. *Stuart* (1); *Clarkson* v. *Ontario Bank* (2); *Edgar* v. *Central Bank of Canada* (3); *Kennedy* v. *Freeman* (4); *Hunter* v. *Drummond* (5); *Union Bank* v. *Neville* (6); *Reg.* v. *County of Wellington* (7).

[1894] *A. C.* p. 192.

The decision appealed from was founded on a judgment of the Supreme Court in *Quirt* v. *The Queen* (8). It was contended that that case was distinguishable, and that the Court below was wrong in considering itself bound by it.

The Privy Council decisions cited were: *Bank of Toronto* v. *Lambe* (9); *L'Union St. Jacques de Montréal* v. *Bélisle* (10); *Cushing* v. *Dupuy* (11); *Citizens Insurance Company* v. *Parsons* (12); *Russell* v. *The Queen* (13); *Reg.* v. *Hodge* (14). These decisions and *Valin* v. *Langlois* (15), establish five rules of construction relating to the Act of 1867—(1.) the presumption is in favour of the validity of an enactment; (2.) the enactment should be so construed as to bring it within the legislative authority: see *M'Leod* v. *Gorernment for New South Wales* (16); (3.) the true nature and construction of the enactment must be determined in order to ascertain the class of subject

(1) Canadian Law Times, vol. vii. p. 6.
(2) 15 Ont. App. 166.
(3) 15 Ont. App. 196.
(4) 15 Ont. App. 216.
(5) 15 Ont. App. 232.
(6) 21 Ont. Rep. 152.
(7) 17 Ont. Rep. 615; 17 Ont. App. Rep. 421.
(8) 19 Sup. Ct. Can. 510.
(9) 12 App. Cas. 575, *ante*, p. 378.
(10) Law Rep. 6 P. C. 31, *ante*, p. 206.
(11) 5 App. Cas. 409, *ante*, p. 253.
(12) 7 App. Cas. 96, *ante*, p. 267.
(13) 7 App. Cas. 829, *ante*, p. 310.
(14) 9 App. Cas. 117, *ante*, p. 333.
(15) 5 App. Cas. 115, *ante*, p. 247.
(16) [1891] A. C. 455.

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to which it really relates; (4.) it must be ascertained if the subject falls within sect. 92, and if so, whether the Court is compelled by sect. 91 or other sections to cut down the full meaning of sect. 92, so that it shall not include the subject of the impugned Act; (5.) subjects which in one aspect fall within sect. 92 may in another aspect and for another purpose fall within sect. 91. Applying these rules, it was contended that the provisions of this Act may have been ancillary to a scheme of bankruptcy, but were not of the essence of it so as to be within the exclusive power of the Dominion.

[1894] *A. C.* *p.* 193.

Sir *Richard Webster*, Q.C., and *Carson*, Q.C., for the respondent:—

In considering whether sect. 9 is ultrà vires the provincial legislature, the whole Act, c. 124, must be considered. It cannot be considered apart from those sections especially which relate to the effect of assignments for the general benefit of creditors, to the proceedings consequent upon such assignment, and to the position of an assignee thereunder. Such assignments necessarily contemplate the insolvency of the assignor; they would not be made under any other circumstances; moreover, the particular assignments contemplated by the impugned Act are the only assignments to which sect. 9 relates, and in all cases it is the sheriff of the county who is to be the assignee, unless with the consent of a majority of the creditors; clearly shewing that the consequences in view are those relating to the remedies of creditors in view of actual insolvency. It is not necessary in order to bring this Act within art. 21 of sect. 91 to shew that it contains compulsory provisions as to the disposal of an insolvent's estate. Voluntary assignments for the purpose of effecting that disposal are a necessary part of a bankruptcy system. When all the provisions are considered as a whole, it results that they, including sect. 9, relate to bankruptcy and insolvency within the meaning of sect. 91. The section impugned is in effect a part of a system of bankruptcy and insolvency which had been enacted, enforced, and then repealed by the Dominion Parliament. Reference was made to an Act of 1864 of the Province of Canada (27 & 28 Vict. c. 17) and to Dominion Act 32 & 33 Vict. c. 16, a Bankruptcy Act which contained provisions for voluntary liquidation, which was amended in 1875 by 38 Vict. c. 16, and further amended in 1877 and 1878, and then repealed by 43 Vict. c. 1, which abolished the Insolvency Acts theretofore in force in Canada. Thus the Dominion Parliament decided deliberately to have no bankruptcy and insolvency system in the Dominion. The province by the impugned Act has attempted to override and reverse that decision by re-enacting part of the repealed legislation, or enacting provisions precisely similar to

[1894] *A. C.* *p.* 194.

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those which the Dominion had rejected. This re-enactment in defiance of the Dominion Parliament was beyond the competence of the Ontario Legislature. [THE LORD CHANCELLOR:—This seems to be a common law assignment for the benefit of the creditors, and does not necessarily relate to bankruptcy. It may be outside the bankruptcy law.] By the law of England as it existed in 1867, and from before the reign of George IV., it was contended that such an assignment as is contemplated by the impugned Act was known as an act of bankruptcy whether made in England or abroad. In using the expression "bankruptcy and insolvency" in sect. 91 of the Act of that year, parliament must have contemplated such things as were known to the bankruptcy and insolvency system of the Imperial Parliament, not excluding such things as would be known to a bankruptcy and insolvency system existing in the Canadian provinces. In effect sect. 9 is a part of a system of bankruptcy and insolvency, i.e., a part of a system which had been enacted by the Dominion and then abolished. What the province has done by this Act is not when fairly considered ancillary to a system which the Dominion might have prescribed, but it is in substance a declaration that laws shall exist in the province which the Dominion has decided by virtue of its exclusive authority under sect. 91 shall not so exist.

Blake, Q.C., replied.

The judgment of their Lordships was delivered by

1894
Feb. 24.

THE LORD CHANCELLOR:—

This appeal is presented by the Attorney-General of Ontario against a decision of the Court of Appeal of that province.

The decision complained of was an answer given to a question referred to that Court by the Lieutenant-Governor of the province in pursuance of an Order in Council.

The question was as follows:— [1894] *A. C.* *p.* 195.

"Had the Legislature of Ontario jurisdiction to enact the 9th section of the Revised Statutes of Ontario, c. 124, and entitled 'An Act respecting Assignments and Preferences by Insolvent Persons'?"

The majority of the Court answered this question in the negative; but one of the judges who formed the majority only concurred with his brethren because he thought the case was governed by a previous decision of the same Court; had he considered the matter res integra he would have decided the other way. The Court was thus equally divided in opinion.

It is not contested that the enactment, the validity of which is in question, is within the legislative powers conferred on the provincial

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legislature by sect. 92 of the British North America Act, 1867, which enables that legislature to make laws in relation to property and civil rights in the province unless it is withdrawn from their legislative competency by the provisions of the 91st section of that Act which confers upon the Dominion Parliament the exclusive power of legislation with reference to bankruptcy and insolvency.

The point to be determined, therefore, is the meaning of those words in sect. 91 of the British North America Act, 1867, and whether they render the enactment impeached ultrà vires of the provincial legislature. That enactment is sect. 9 of the Revised Statutes of Ontario of 1887, c. 124, entitled "An Act respecting Assignment and Preferences by Insolvent Persons." The section is as follows:—

"An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriff's hands."

In order to understand the effect of this enactment it is necessary to have recourse to other sections of the Act to see what is meant by the words "an assignment for the general benefit of creditors under this Act."

[1894] *A. C.* *p.* 196.

The first section enacts that if any person in insolvent circumstances, or knowing himself to be on the eve of insolvency, voluntarily confesses judgment, or gives a warrant of attorney to confess judgment, with intent to defeat or delay his creditors, or to give any creditor a preference over his other creditors, every such confession or warrant of attorney shall be void as against the creditors of the party giving it.

The 2nd section avoids as against the other creditors any gift or assignment of goods or other property made by a person at a time when he is in insolvent circumstances, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors or give any of them a preference.

Then follows sect. 3, which is important:—

Its 1st sub-section provides that nothing in the preceding section shall apply to an assignment made to the sheriff of a county in which the debtor resides or carries on business, or to any assignee resident within the province with the consent of his creditors as thereinafter provided for the purpose of paying, rateably and proportionately, and without preference or priority all the creditors of the debtor their just debts.

The 2nd sub-section enacts that every assignment for the general benefit of creditors which is not void under sect. 2 but is not made to

the sheriff nor to any other person with the prescribed consent of the creditors shall be void as against a subsequent assignment which is in conformity with the Act, and shall be subject in other respects to the provisions of the Act, until and unless a subsequent assignment is executed in accordance therewith.

The 5th sub-section states the nature of the consent of the creditors which is requisite for assignment in the first instance to some person other than the sheriff.

These are the only sections to which it is necessary to refer in order to explain the meaning of sect. 9.

Before discussing the effect of the enactments to which attention has been called, it will be convenient to glance at the course of legislation in relation to this and cognate matters both in the province and in the Dominion. The enactments of the 1st and 2nd sections of the Act of 1887 are to be found in substance in sects. 18 and 19 of the Act of the Province of Canada passed in 1858 for the better prevention of fraud. There is a proviso to the latter section which excepts from its operation any assignment made for the purpose of paying all the creditors of the debtor rateably without preference. These provisions were repeated in the Revised Statutes of Ontario, 1877, c. 118. A slight amendment was made by the Act of 1884, and it was as thus amended that they were re-enacted in 1887. At the time when the statute of 1858 was passed there was no bankruptcy law in force in the Province of Canada. In the year 1864 an Act respecting insolvency was enacted. It applied in Lower Canada to traders only; in Upper Canada to all persons whether traders or non-traders. It provided that a debtor should be deemed insolvent and his estate should become subject to compulsory liquidation if he committed certain acts similar to those which had for a long period been made acts of bankruptcy in this country. Among these acts were the assignment or the procuring of his property to be seized in execution with intent to defeat or delay his creditors, and also a general assignment of his property for the benefit of his creditors otherwise than in manner provided by the statute. A person who was unable to meet his engagements might avoid compulsory liquidation by making an assignment of his estate in the manner provided by that Act; but unless he made such an assignment within the time limited the liquidation became compulsory.

[1894] *A. C.* *p.* 197.

This Act was in operation at the time when the British North America Act came into force.

In 1869 the Dominion Parliament passed an Insolvency Act which proceeded on much the same lines as the Provincial Act of 1864, but applied to traders only. This Act was repealed by a new Insolvency

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Act of 1875, which, after being twice amended, was, together with the Amending Acts, repealed in 1880.

In 1887, the same year in which the Act under consideration was passed, the provincial legislature abolished priority amongst creditors by an execution in the High Court and county courts, and provided for the distribution of any moneys levied on an execution rateably amongst all execution creditors, and all other creditors who within a month delivered to the sheriff writs and certificates obtained in the manner provided for by that Act.

[1894] *A. C.* p. 198.

Their Lordships proceed now to consider the nature of the enactment said to be ultra vires. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. Now there can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they may be made available for the recovery of debts are primâ facie within the legislative powers of the provincial parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise. The Act of 1887 which abolished priority as amongst execution creditors provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other Act of the same year, containing the section which is impeached, goes a step further, and gives to all creditors under an assignment for their general benefit a right to a rateable share of the assets of the debtor, including those which have been seized in execution.

But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency, and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the Province of Canada which prevailed at the time when the Dominion Act was passed, it was one of the grounds for an adjudication of insolvency.

[1894] *A. C.* p. 199.

It is to be observed that the word "bankruptcy" was apparently not used in Canadian legislation, but the insolvency law of the Province of Canada was precisely analogous to what was known in England as the bankruptcy law.

Moreover, the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent. It was open to any debtor who might deem his solvency doubtful, and who desired in that case that his creditors should be equitably dealt with, to make an assignment for their benefit. The validity of the assignment and its effect would in no way depend on the insolvency of the assignor, and their Lordships think it clear that the 9th section would equally apply whether the assignor was or was not insolvent. Stress was laid on the fact that the enactment relates only to an assignment under the Act containing the section, and that the Act prescribes that the sheriff of the county is to be the assignee unless a majority of the creditors consent to some other assignee being named. This does not appear to their Lordships to be material. If the enactment would have been intrà vires, supposing sect. 9 had applied to all assignments without these restrictions, it seems difficult to contend that it became ultrà vires by reason of them. Moreover, it is to be observed that by sub-sect. 2 of sect. 3, assignments for the benefit of creditors not made to the sheriff or to other persons with the prescribed consent, although they are rendered void as against assignments so made, are nevertheless, unless and until so avoided, to be "subject in other respects to the provisions" of the Act.

At the time when the British North America Act was passed bankruptcy and insolvency legislation existed, and was based on very similar provisions both in Great Britain and the Province of Canada. Attention has already been drawn to the Canadian Act.

The English Act then in force was that of 1861. That Act applied to traders and non-traders alike. Prior to that date the operation of the Bankruptcy Acts had been confined to traders. The statutes relating to insolvent debtors, other than traders, had been designed to provide for their release from custody on their making an assignment of the whole of their estate for the benefit of their creditors.

[1894] *A. C.* *p.* 200.

It is not necessary to refer in detail to the provisions of the Act of 1861. It is enough to say that it provided for a legal adjudication in bankruptcy with the consequence that the bankrupt was divested of all his property and its distribution amongst his creditors was provided for.

It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define, what is covered by the words "bankruptcy" and "insolvency" in sect. 91 of the British North

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America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate.

In their Lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature (1). Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence (2).

[1894] *A. C.* *p.* 201.

Their Lordships will therefore humbly advise Her Majesty that the decision of the Court of Appeal ought to be reversed, and that the question ought to be answered in the affirmative. The parties will bear their own costs of this appeal.

Solicitors for the appellant: *Freshfields & Williams.*
Solicitors for the respondent: *Bompas, Bischoff & Co.*

(1) Appr. *Ontario* v. *Canada*, *post*, p. 491.

(2) Appl. *Grand Trunk Railway* v. *Canada*, *post*, p. 638. Expl. *Canada* v. *Ontario*, *post*, p. 456.

BROPHY *v.* MANITOBA [1895] A. C. 202.

J. C.*
1894
Dec. 11, 12, 13.
1895
Jan. 29.

BROPHY AND OTHERS . . . . . APPELLANTS;

AND

THE ATTORNEY-GENERAL OF MANITOBA . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Province of Manitoba—Dominion Statute, 33 Vict. c. 3, s. 22, sub-ss. 2, 3—Manitoba Public Schools Act, 1890—Appeal to the Governor-General in Council—Remedies against Provincial Legislation.

Where the Roman Catholic minority of Manitoba appealed to the Governor-General in Council against the Manitoba Education Acts of 1890, on the ground that their rights and privileges in relation to education had been affected thereby:—

Held, reversing the judgment of the Supreme Court on a case submitted to it:

(*a*) That such appeal lay under sect. 22, sub-sect. 2, of the Manitoba Act, 1870, which applies to rights and privileges acquired by legislation in the province after the date thereof.

(*b*) That the Roman Catholics having acquired by such legislation the right to control and manage their denominational schools, to have them maintained out of the general taxation of the province, to select books for their use, and to determine the character of the religious teaching therein, were affected as regards that right by the Acts of 1890, under which State aid was withdrawn from their schools, while they themselves remained liable to local assessment in support of non-sectarian schools to which they conscientiously objected.

(*c*) That the Governor-General in Council has power to make remedial orders in the premises within the scope of sub-sect. 3 of sect. 22—*e.g.*, by supplemental rather than repealing legislation.

Appeal, by special leave, from a decree of the Supreme Court (Feb. 20, 1894), upon a case referred thereto by the Governor-General in Council, for hearing and consideration pursuant to the Supreme and Exchequer Courts (Revised Stat. Can. c. 135) as amended by Dominion Act, 54 & 55 Vict. c. 25, s. 4.

The substantial questions submitted by that case were (1.) whether any appeal lay to the Governor-General in Council from two statutes passed by the Legislature of Manitoba in the year 1890, being 53 Vict. c. 37, and the Public Schools Act 1890, whereby a general system of non-sectarian public education was established in the place of the denominational system that had previously existed; (2.) whether the Governor-General in Council had power to make

* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, and LORD SHAND.

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the declarations or remedial orders which were asked for in certain memorials that had been presented to him.

The memorialists complained that their rights and privileges in relation to education had been affected by the two statutes before mentioned, and asked for a declaration that such rights and privileges had been prejudicially affected thereby; and that the Governor-General in Council should give such directions and make such remedial orders for the relief of the Roman Catholics of the Province of Manitoba as to His Excellency in Council might seem fit.

The Supreme Court of Canada (Strong, C.J., Fournier, Taschereau, Gwynne, and King, JJ.) after argument decided by a majority that no such appeal lay from the said statutes: Strong, C.J., and Taschereau and Gwynne, JJ., held that no appeal lay, and that the Governor-General in Council had not the power to make the orders asked for: Fournier and King, JJ., were of the contrary opinion.

Manitoba joined the Union in 1870, upon the terms of the Manitoba Act, 33 Vict. c. 3 (Dominion Statute), which Act was declared valid and effectual by the British North America Act, 1871, 34 & 35 Vict. c. 28, s. 5. The questions submitted turned upon the construction of sects. 2 and 22 of the Manitoba Act, and sect. 93, sub-sect. 3, of the British North America Act, 1867.

Sect. 2 of the Manitoba Act, 1870, is as follows:

"2. On and after the said day on which the order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts which are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more but not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba in the same way and to the same extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act."

[1895] *A. C.* *p.* 204.

Sect. 22 of the Act is as follows:

"In and for the Province, the said Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

"(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the Union.

"(2.) An appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province, or

of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

"(3.) In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then, and in every such case and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section."

Sect. 93 of the British North America Act, 1867, is—

"In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

"(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools, which any class of persons have by law in the Province at the Union. . . .

"(3.) Where in any province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

[1895] *A. C.* p. 205.

In submitting the case referred to the Supreme Court the Governor-General in Council set forth the evidence in two cases called *Barrett's Case* and *Logan's Case* (1), the effect of which is stated in the judgment of their Lordships therein. The following is a short summary thereof:—

At the time when Manitoba was admitted to the Union there was no law or regulation or ordinance with respect to education in force. There were no public schools in the sense of State schools, but there existed throughout the Province a number of denominational schools maintained by school fees or voluntary contributions, and conducted according to the tenets of the religious body to which they might belong. These schools were neither supported by grants from the public funds, nor were any of them in any way regulated or controlled by any public officials. In 1871, however, the year after the admission of Manitoba to the

(1) [1892] A. C. 445, *ante*, p. 421.

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Union, a law was passed which established throughout the Province a system of denominational education in the common schools, as they were then called. A Board of Education was formed, which was to be divided into two sections—Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Each of the twenty-four electoral divisions into which the Province had by the Manitoba Act been divided was constituted a school district in the first instance, and there was to be a school in each district. Twelve electoral divisions "comprising mainly a Protestant population" were to be considered Protestant school districts; twelve "comprising mainly a Roman Catholic population" were to be considered Roman Catholic school districts. These schools were to be maintained by grants from the public funds, to be divided equally between the Protestant and Roman Catholic schools, and contributions from the people of each school district. Such contributions might be raised by an assessment on the property of the school district.

[1895] *A. C.* *p.* 206.

The laws relating to education were modified from time to time. From the year 1876 to 1890 enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school, or a Roman Catholic ratepayer for a Protestant school, and by an Act passed in 1881 it was provided that the legislative grant should no longer be divided equally between Protestant and Roman Catholic schools, but should be divided between the Protestant and Roman Catholic section of the Board in proportion to the number of children between the ages of five and fifteen residing in the various Protestant and Roman Catholic school districts

The system of denominational education was maintained in full vigour until 1890, when the statutes complained of by the appellants were passed. One of them established in the place of the Board of Education a Department of Education, and a board consisting of seven members, known as the "Advisory Board."

The Public Schools Act, 1890, repealed all previous legislation relating to public education, and enacted that all Protestant and Roman Catholic school districts should be subject to the provisions of the Act, and that all public schools should be free schools. At the option of the school trustees for each district, religious exercises conducted according to the regulations of the Advisory Board and at the times prescribed by the Act were to be held in the public schools. The religious services were to be entirely non-sectarian, and any pupil whose parent or guardian should so wish was to

be dismissed from school before the religious exercises should take place.

The Act then provided for the formation, alteration, and union of school districts, for the election of school trustees, and for levying a rate on the taxable property in each school district for school purposes. A portion of the legislative grant for educational purposes was allotted to public schools, but no school was to participate in the grant unless it were conducted according to all the provisions of the Act and the regulations of the Department of Education and of the Advisory Board.

[1895] *A. C.* p. 207.

E. Blake, Q.C., and *J. S. Ewart*, Q.C., of the Canadian Bar, for the appellants, who represented the Roman Catholic minority of the Queen's subjects in the Province of Manitoba, contended (1.) that the appeal was admissible; (2.) that the Governor-General in Council could and ought to have given appropriate relief. In *Barrett's* and *Logan's Cases* (1) the validity of the Public Schools Act, 1890, was assailed as ultra vires having regard to sect. 22, sub-sect. 1 of the Manitoba Act, 1870. Here its validity is assumed, but it is contended that an appeal lies to the Governor-General in Council to rectify its provisions as transgressing the restrictions contained in sub-sect. 2, which sub-section is in harmony with sub-sect. 3 of sect. 93 of the Imperial Act of 1867. There are several marked distinctions of the same character between sub-sects. 1 and 2 of the Manitoba Act, and also between sub-sects. 1 and 3 of sect. 93 of the Act of 1867. They shew that sub-sect. 1 of each section relates to a different class of cases and to a different condition of things from that dealt with by the later sub-section. For example, sub-sect. 1 of the Manitoba Act refers to a right or privilege with respect to denominational schools of any class of persons, whether constituting a majority of the population or not, existing by law or practice at the date of the Union, and to cases in which such right has been prejudicially affected. Sub-sect. 2, on the other hand, refers to a right or privilege in relation to education of a particular class, namely, a Protestant or Roman Catholic minority, whether existing at the date of the Union or created thereafter, and to cases in which such right has been affected in any way, including cases in which the relative status was altered, even though the actual position of the minority was not changed for the worse. The cases, therefore, are broadly distinguished in which, on the one hand, legislation is void as ultra vires, and in which, on the other, legislation though intra vires yet affects the rights and privileges of a class. In the former case no appeal

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is required. Any one aggrieved can successfully resist its application. In the latter an appeal of the kind refused by the Supreme Court is requisite, appropriate, and useful as leading to redress by supplemental corrections of the Acts impugned. In this case the Manitoba Education Acts passed prior to 1890 confirmed and continued to the minority a right or privilege in relation to education within the meaning of sub-sect. 2 of the Manitoba Act. They also established a system of separate or dissentient schools within the meaning of sub-sect. 2 of the Act of 1867, sect. 93. The provisions of the Manitoba Acts of 1890 did, on the contrary, affect a right and privilege of the minority in such sort that an appeal for redress lay to the Governor-General in Council. As regards sub-sect. 3 of sect. 93 of the Act of 1867, it applies on its true construction to Manitoba, for the general object of that Act was to put all the provinces at whatever date they entered the confederation as nearly as possible on the same footing. The Manitoba Act does not restrict the Act of 1867 while making it applicable in a general way; it was contended that its terms are even wider than those of the earlier Act. It was not sought in this appeal for any declaration as to the extent of the relief to be granted by the Governor-General; a ruling was desired that he had jurisdiction to hear the prayer of the petition and to grant appropriate relief.

[1895] *A. C.* *p.* 208.

Cozens-Hardy, Q.C., *Haldane*, Q.C., and *Bray*, for the respondent, contended that the Supreme Court decided rightly. Laws in relation to education are within the powers of the provincial legislature. As regards the Manitoba legislature, those powers are completely defined by sect. 22 of the Manitoba Act. Those powers are not limited, extended, or in any way affected by sect. 93 of the British North America Act, 1867. As regards sub-sect. 3 of sect. 93, assuming it applies just as it stands to Manitoba, it was contended that this appeal did not lie thereunder. The appeal allowed by that sub-section was an appeal from an "Act or decision of any provincial authority." The statutes complained of, namely, the Acts of 1890, are not Acts or decisions of a provincial authority within the meaning of that section, which points rather to executive and judicial than to legislative authority; and, in the second place, there is not and there never has been a system of separate or dissentient schools established by law in Manitoba.

[1895] *A. C.* *p.* 209.

But that sub-section 3 has been varied by sub-sect. 2 of sect. 22 of the Manitoba Act. It therefore does not apply, by virtue of sect. 2 of that Act. The position is this: sub-sect. 1 exhaustively defines the limits set to provincial legislative authority. Sub-sect.

2 contains more general provisions, which should be read as consistent with and not as cutting down the language of sub-sect. 1. There is no inconsistency between those sub-sections, and the latter should be so construed as to leave the former as fully operative as if it had stood alone. Accordingly, under sect. 22, an appeal to the Governor-General only lies when rights or privileges existing by law or practice at the Union have been affected. The decisions in *Barrett's* and *Logan's Cases* (1) are conclusive that such privileges have not been infringed. On the contrary view contended for by the appellants, assuming that rights and privileges created since the Union are within the meaning of sect. 22, still the Acts of 1890 have not affected any right or privilege of the Roman Catholic minority in relation to education established by law or practice since that time. The main effect of that legislation was that all public schools should be free schools; that all districts, whether Roman Catholic or Protestant, should be subject to its provisions. Certain non-sectarian religious exercises were to be held in the public schools at the option of the school trustees. Pupils might withdraw before this took place. No school which infringed those regulations would participate in the grant. All denominations were therefore placed on an equal footing; their special teaching was impartially excluded from within the schools, and impartially permitted without the schools. The Acts between 1871 and 1890 did not give any vested right or privilege at all to the minority in relation to education; only contingent and conditional rights and privileges of exemption from the system thereby established. No doubt the Acts of 1890 repealed all previous legislation with regard to education. If any appeal lay on that ground, it would be tantamount to denying the right inherent in all legislatures of repealing or altering its own legislation. It would reduce the provincial power of legislation to a nullity if the Governor-General in Council should be held to possess an arbitrary jurisdiction to review and rescind at his discretion, and without any reference to the constitutional right of the province of Manitoba, any Acts of its legislature, notwithstanding that they are intra vires and constitutional.

[1895] *A. C.* p. 210.

Blake, Q.C., replied.

1895. Jan. 29. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR :—

In the year 1890 two Acts were passed by the legislature of

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Manitoba relating to education. One of these created a Department of Education and an "Advisory Board." The board was to consist of seven members, four of whom were to be appointed by the Department of Education, two to be elected by the public and high school teachers of the Province, and one to be appointed by the University Council. The Advisory Board were empowered (amongst other things) to authorize text books for the use of pupils and to prescribe the form of religious exercises to be used in schools.

The other Act, which was termed "The Public Schools Act," established a system of public education "entirely non-sectarian," no religious exercises being allowed except those conducted according to the regulations of the Advisory Board. It will be necessary hereafter to refer somewhat more in detail to the provisions of this Act.

The Act came into force on the 1st of May, 1890. By virtue of its provisions, bye-laws were made by the municipal corporation of Winnipeg, under which a rate was to be levied upon Protestant and Roman Catholic ratepayers alike for school purposes. An application was thereupon made to the Court of Queen's Bench of Manitoba to quash these bye-laws on the ground that the Public Schools Act, 1890, was ultra vires of the Provincial Legislature, inasmuch as it prejudicially affected a right or privilege with respect to denominational schools which the Roman Catholics had by law or practice in the Province at the Union. The Court of Queen's Bench refused the application, being of opinion that the Act was intra vires. The Supreme Court of Canada took a different view; but upon appeal this Board reversed their decision and restored the judgment of the Court of Queen's Bench.

[1895] *A. C.* *p.* 211.

Memorials and petitions were afterwards presented to the Governor-General in Council on behalf of the Roman Catholic minority of Manitoba by way of appeal against the Education Acts of 1890. These memorials and petitions having been taken into consideration, a case in relation thereto was in pursuance of the provisions of the Supreme and Exchequer Courts Act referred by the Governor-General in Council to the Supreme Court of Canada. The questions referred for hearing and consideration were the following:—

"(1.) Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by sub-sect. 3 of sect. 93 of the British North America Act, 1867, or by sub-sect. 2 of sect. 22 of the Manitoba Act, 33 Vict. c. 3, Canada?

"(2.) Are the grounds set forth in the petitions and memorials

such as may be the subject of appeal under the authority of the sub-sections above referred to, or either of them?

"(3.) Does the decision of the Judicial Committee of the Privy Council in the cases of *Barrett* v. *The City of Winnipeg* (1) and *Logan* v. *The City of Winnipeg* (1) dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the Union under the statutes of the Province have been interfered with by the two statutes of 1890 complained of in the said petitions and memorials?

"(4.) Does sub-sect. 3 of sect. 93 of the British North America Act, 1867, apply to Manitoba?

"(5.) Has His Excellency the Governor-General in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor-General in Council any other jurisdiction in the premises?

"(6.) Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority 'a right or privilege in relation to education' within the meaning of sub-sect. 2 of sect. 22 of the Manitoba Act, or establish a system of separate or dissentient schools 'within the meaning of sub-sect. 3 of sect. 93 of the British North America Act, 1867,' if said sect. 93 be found applicable to Manitoba; and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor-General in Council?"

[1895] *A. C.* p. 212.

The learned judges of the Supreme Court were divided in opinion upon each of the questions submitted. They were all, however, by a majority of three judges out of five, answered in the negative.

The appeal to the Governor-General in Council was founded upon the 22nd section of the Manitoba Act, 1870, and the 93rd section of the British North America Act, 1867. By the former of these statutes (which was confirmed and declared to be valid and effectual by an Imperial statute) Manitoba was created a province of the Dominion.

The 2nd section of the Manitoba Act enacts that after the prescribed day the British North America Act shall "except those parts thereof which are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more but not the whole of the provinces now com-

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posing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba in the same way and to the like extent as they apply to the several provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act." It cannot be questioned therefore that sect. 93 of the British North America Act (save such parts of it as are specially applicable to some only of the provinces of which the Dominion was in 1870 composed) is made applicable to the Province of Manitoba, except in so far as it is varied by the Manitoba Act. The 22nd section of that statute deals with the same subject-matter as sect. 93 of the British North America Act. The 2nd sub-section of this latter section may be discarded from consideration, as it is manifestly applicable only to the Provinces of Ontario and Quebec. The remaining provisions closely correspond with those of sect. 22 of the Manitoba Act. The only difference between the introductory part and the 1st sub-section of the two sections, is that in the Manitoba Act the words "or practice" are added after the word "law" in the 1st sub-section. The 3rd sub-section of sect. 22 of the Manitoba Act is identical with the 4th sub-section of sect. 93 of the British North America Act. The 2nd and 3rd sub-sections respectively are the same, except that in the 2nd sub-section of the Manitoba Act the words "of the Legislature of the province or" are inserted before the words "any provincial authority," and that the 3rd sub-section of the British North America Act commences with the words: "Where in any province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the province." In view of this comparison it appears to their Lordships impossible to come to any other conclusion than that the 22nd section of the Manitoba Act was intended to be a substitute for the 93rd section of the British North America Act. Obviously all that was intended to be identical had been repeated, and in so far as the provisions of the Manitoba Act differ from those of the earlier statute they must be regarded as indicating the variations from those provisions intended to be introduced in the Province of Manitoba.

[1895] *A. C.* *p.* 213.

In their Lordships' opinion, therefore, it is the 22nd section of the Manitoba Act which has to be construed in the present case, though it is of course legitimate to consider the terms of the earlier Act, and to take advantage of any assistance they may afford in the construction of enactments with which they so closely correspond and which have been substituted for them.

Before entering upon a critical examination of the important section of the Manitoba Act, it will be convenient to state the circumstances under which that Act was passed, and also the exact scope of the decision of this Board in the case of *Barrett* v. *The City of Winnipeg* (1), which seems to have given rise to some misapprehension. In 1867 the union of the Provinces of Canada, Nova Scotia, and New Brunswick took place. Among the obstacles which had to be overcome in order to bring about that union, none perhaps presented greater difficulty than the differences of opinion which existed with regard to the question of education. It had been the subject of much controversy in Upper and Lower Canada. In Upper Canada a general system of undenominational education had been established, but with provision for separate schools to supply the wants of the Catholic inhabitants of that province. The 2nd sub-section of sect. 93 of the British North American Act extended all the powers, privileges, and duties which were then by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Roman Catholic inhabitants of that province to the dissentient schools of the Protestant and Roman Catholic inhabitants of Quebec. There can be no doubt that the views of the Roman Catholic inhabitants of Quebec and Ontario with regard to education were shared by the members of the same communion in the territory which afterwards became the Province of Manitoba. They regarded it as essential that the education of their children should be in accordance with the teaching of their Church, and considered that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could only be secured in schools conducted under the influence and guidance of the authorities of their Church. At the time when the Province of Manitoba became part of the Dominion of Canada, the Roman Catholic and Protestant populations in the province were about equal in number. Prior to that time there did not exist in the territory then incorporated any public system of education. The several religious denominations had established such schools as they thought fit, and maintained them by means of funds voluntarily contributed by the members of their own communion. None of them received any State aid.

[1895] *A. C.* p. 214.

The terms upon which Manitoba was to become a province of the Dominion were matter of negotiation between representatives of the inhabitants of Manitoba and of the Dominion Government.

(1) [1892] A. C. 445, *ante*, p. 421.

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The terms agreed upon, so far as education was concerned, must be taken to be embodied in the 22nd section of the Act of 1870. Their Lordships do not think that anything is to be gained by the inquiry how far the provisions of this section placed the Province of Manitoba in a different position from the other provinces, or whether it was one more or less advantageous. There can be no presumption as to the extent to which a variation was intended. This can only be determined by construing the words of the section according to their natural signification.

[1895] *A. C.* *p.* 215.

Among the very first measures passed by the Legislature of Manitoba was an Act to establish a system of education in the Province. The provisions of that Act will require examination. It is sufficient for the present to say that the system established was distinctly denominational. This system, with some modifications of the original scheme, the fruit of later legislation, remained in force until it was put an end to by the Acts which have given rise to the present controversy.

In *Barrett's Case* (1), the sole question raised was whether the Public Schools Act of 1890 prejudicially affected any right or privilege which the Roman Catholics by law or practice had in the province *at the Union*. Their Lordships arrived at the conclusion that this question must be answered in the negative. The only right or privilege which the Roman Catholics then possessed, either by law or in practice, was the right or privilege of establishing and maintaining for the use of members of their own Church such schools as they pleased. It appeared to their Lordships that this right or privilege remained untouched, and therefore could not be said to be affected by the legislation of 1890. It was not doubted that the object of the 1st sub-section of sect. 22 was to afford protection to denominational schools, or that it was proper to have regard to the intent of the Legislature and the surrounding circumstances in interpreting the enactment. But the question which had to be determined was the true construction of the language used. The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact. It is true that the construction put by this Board upon the 1st sub-section reduced within very narrow limits the protection afforded by that sub-section in respect of denominational schools. It may be that those who were acting on behalf of the Roman Catholic community in Manitoba, and those who either framed

[1895] *A. C.* *p.* 216.

(1) [1892] A. C. 445, *ante*, p. 421.

or assented to the wording of that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the Legislature, if violence were done to the language in which their legislation has taken shape; but such a course would on the whole be quite as likely to defeat as to further the object which was in view. Whilst, however, it is necessary to resist any temptation to deviate from sound rules of construction in the hope of more completely satisfying the intention of the Legislature, it is quite legitimate where more than one construction of a statute is possible, to select that one which will best carry out what appears from the general scope of the legislation and the surrounding circumstances to have been its intention.

With these preliminary observations their Lordships proceed to consider the terms of the 2nd and 3rd sub-sections of sect. 22 of the Act of 1870, upon the construction of which the questions submitted chiefly depend. For the reasons which have been given their Lordships concur with the majority of the Supreme Court in thinking that the main issues are not in any way concluded either by the decision in *Barrett's Case* (1) or by any principles involved in that decision.

At the outset this question presents itself. Are the 2nd and 3rd sub-sections, as contended by the respondent, and affirmed by some of the Judges of the Supreme Court, designed only to enforce the prohibition contained in the 1st sub-section? The arguments against this contention appear to their Lordships conclusive. In the first place that sub-section needs no further provision to enforce it. It imposes a limitation on the legislative powers conferred. Any enactment contravening its provisions is beyond the competency of the Provincial Legislature, and therefore null and void. It was so decided by this Board in *Barrett's Case* (1). A doubt was there suggested whether that appeal was competent, in consequence of the provisions of the 2nd sub-section, but their Lordships were satisfied that the provisions of sub-sects. 2 and 3 did not "operate to withdraw such a question as that involved in the case from the jurisdiction of the ordinary tribunals of the country." It is hardly necessary to point out [1895] *A. C.* p. 217.

(1) [1892] A. C. 445, *ante*, p. 421.

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how improbable it is that it should have been intended to give a concurrent remedy by appeal to the Governor-General in Council. The inconveniences and difficulties likely to arise, if this double remedy were open, are obvious. If for example the Supreme Court of Canada, and this Committee on Appeal, declared an enactment of the Legislature of Manitoba relating to education to be intra vires, and the Governor-General in Council on an appeal to him considered it ultra vires, what would happen? If the Provincial Legislature declined to yield to his view, as would almost certainly and most naturally be the case, recourse could only be had to the Parliament of the Dominion. But the Parliament of Canada is only empowered to legislate as far as the circumstances of the case require "for the due execution of the provisions" of the 22nd section. If it were to legislate in such a case as has been supposed, its legislation would necessarily be declared ultra vires by the Courts which had decided that the provisions of the section had not been violated by the Legislature of the province. If, on the other hand, the Governor-General declared a provincial law to be intra vires, it would be an ineffectual declaration. It could only be made effectual by the action of the Courts, which would have for themselves to determine the question which he decided, and if they arrived at a different conclusion and pronounced the enactment ultra vires it would be none the less null and void because the Governor-General in Council had declared it intra vires. These considerations are of themselves most cogent to shew that the 2nd sub-section ought not to be construed as giving to parties aggrieved an appeal to the Governor-General in Council concurrently with the right to resort to the Courts in case the provisions of the 1st sub-section are contravened, unless no other construction of the sub-sections be reasonably possible. The nature of the remedy, too, which the 3rd sub-section provides, for enforcing the decision of the Governor-General, strongly confirms this view. That remedy is either a provincial law or a law passed by the Parliament of Canada. What would be the utility of passing a law for the purpose merely of annulling an enactment which the ordinary tribunals would without legislation declare to be null, and to which they would refuse to give effect? Such legislation would indeed be futile.

[1895] *A. C.* *p.* 218.

So far the matter has been dealt with apart from an examination of the terms of the 2nd sub-section itself. The considerations adverted to would seem to justify any possible construction of that sub-section which would avoid the consequences pointed

out. But when its language is examined, so far from presenting any difficulties, it greatly strengthens the conclusion suggested by the other parts of the section. The first sub-section is confined to a right or privilege of a "class of persons" with respect to denominational education "at the Union," the 2nd sub-section applies to laws affecting a right or privilege "of the Protestant or Roman Catholic minority" in relation to education. If the object of the 2nd sub-section had been that contended for by the Respondent, the natural and obvious mode of expressing such intention would have been to authorize an appeal from any Act of the Provincial Legislature affecting "any such right or privilege as aforesaid." The limiting words "at the Union" are however omitted, for the expression "any class of persons" there is substituted "the Protestant or Roman Catholic minority of the Queen's subjects," and instead of the words "with respect to denominational schools," the wider term "in relation to education" is used.

The 1st sub-section invalidates a law affecting prejudicially the right or privilege of "any class" of persons, the 2nd sub-section gives an appeal only where the right or privilege affected is that of the "Protestant or Roman Catholic minority." Any class of the majority is clearly within the purview of the 1st sub-section, but it seems equally clear that no class of the Protestant or Catholic majority would have a locus standi to appeal under the 2nd sub-section, because its rights or privileges had been affected. Moreover to bring a case within that sub-section it would be essential to shew that a right or privilege had been "affected." Could this be said to be the case because a void law had been passed which purported to do something but was wholly ineffectual? To prohibit a particular enactment and render it ultra vires surely prevents its affecting any rights.

[18: 3] *A. C.* p. 219.

It would do violence to sound canons of construction if the same meaning were to be attributed to the very different language employed in the two sub-sections.

In their Lordships' opinion the 2nd sub-section is a substantive enactment, and is not designed merely as a means of enforcing the provision which precedes it. The question then arises, does the sub-section extend to rights and privileges acquired by legislation subsequent to the Union? It extends in terms to "any" right or privilege of the minority affected by an Act passed by the Legislature, and would therefore seem to embrace all rights and privileges existing at the time when such Act was

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passed. Their Lordships see no justification for putting a limitation on language thus unlimited. There is nothing in the surrounding circumstances, or in the apparent intention of the Legislature, to warrant any such limitation. Quite the contrary. It was urged that it would be strange if an appeal lay to the Governor-General in Council against an Act passed by the Provincial Legislature because it abrogated rights conferred by previous legislation, whilst if there had been no previous legislation, the Acts complained of would not only have been intra vires, but could not have afforded ground for any appeal. There is no doubt force in this argument, but it admits, their Lordships think, of an answer.

Those who were stipulating for the provisions of sect. 22 as a condition of the Union, and those who gave their legislative assent to the Act by which it was brought about, had in view the perils then apprehended. The immediate adoption by the Legislature of an educational system obnoxious either to Catholics or Protestants would not be contemplated as possible. As has been already stated, the Roman Catholics and Protestants in the province were about equal in number. It was impossible at that time for either party to obtain legislative sanction to a scheme of education obnoxious to the other. The establishment of a system of public education in which both parties would concur was probably then in immediate prospect. The Legislature of Manitoba first met on the 15th of March, 1871. On the 3rd of May following the Education Act of 1871 received the Royal Assent. But the future was uncertain. Either Roman Catholics or Protestants might become the preponderating power in the Legislature, and it might under such conditions be impossible for the minority to prevent the creation at the public cost of schools which, though acceptable to the majority, could only be taken advantage of by the minority on the terms of sacrificing their cherished convictions. The change to a Roman Catholic system of public schools would have been regarded with as much distaste by the Protestants of the province as the change to an unsectarian system was by the Catholics.

[1895] *A. C.* *p.* 220.

Whether this explanation be the correct one or not, their Lordships do not think that the difficulty suggested is a sufficient warrant for departing from the plain meaning of the words of the enactment, or for refusing to adopt the construction which apart from this objection would seem to be the right one.

Their Lordships being of opinion that the enactment which governs the present case is the 22nd section of the Manitoba Act,

it is unnecessary to refer at any length to the arguments derived from the provisions of sect. 93 of the British North America Act. But in so far as they throw light on the matter they do not in their Lordships' opinion weaken, but rather strengthen the views derived from a study of the later enactment. It is admitted that the 3rd and 4th sub-sections of sect. 93 (the latter of which is, as has been observed, identical with sub-sect. 3 of sect. 22 of the Manitoba Act) were not intended to have effect merely when a provincial Legislature had exceeded the limit imposed on its powers by sub-sect. 1, for sub-sect. 3 gives an appeal to the Governor-General, not only where a system of separate or dissentient schools existed in a province at the time of the Union, but also where in any province such a system was "thereafter established by the Legislature of the province." It is manifest that this relates to a state of things created by post-Union legislation. It was said it refers only to acts or decisions of a "provincial authority," and not to acts of a provincial Legislature. It is unnecessary to determine this point, but their Lordships must express their dissent from the argument that the insertion of the words "of the Legislature of the province" in the Manitoba Act shews that in the British North America Act it could not have been intended to comprehend the Legislatures under the words "any provincial authority." Whether they be so comprehended or not has no bearing on the point immediately under discussion.

[1895] *A. C.* *p.* 221.

It was argued that the omission from the 2nd sub-section of sect. 22 of the Manitoba Act of any reference to a system of separate or dissentient schools "thereafter established by the Legislature of the province" was unfavourable to the contention of the Appellants. This argument met with some favour in the Court below. If the words with which the 3rd sub-section of sect. 93 commences had been found in sub-sect. 2 of sect. 22 of the Manitoba Act, the omission of the following words would no doubt have been important. But the reason for the difference between the sub-sections is manifest. At the time the Dominion Act was passed a system of denominational schools adapted to the demands of the minority existed in some provinces, in others it might thereafter be established by legislation, whilst in Manitoba in 1870 no such system was in operation, and it could only come into existence by being "thereafter established." The words which preface the right of appeal in the Act creating the Dominion would therefore have been quite inappropriate in the Act by which Manitoba became a province of the Dominion.

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But the terms of the critical sub-section of that Act are, as has been shewn, quite general, and not made subject to any condition or limitation.

Before leaving this part of the case, it may be well to notice the argument urged by the Respondent that the construction which their Lordships have put upon the 2nd and 3rd sub-sections of sect. 22 of the Manitoba Act is inconsistent with the power conferred upon the Legislature of the province to "exclusively make laws in relation to education." The argument is fallacious. The power conferred is not absolute, but limited. It is exerciseable only "subject and according to the following provisions." The sub-sections which follow, therefore, whatever be their true construction, define the conditions under which alone the Provincial Legislature may legislate in relation to education, and indicate the limitations imposed on, and the exceptions from, their power of exclusive legislation. Their right to legislate is not indeed, properly speaking, exclusive, for in the case specified in sub-sect. 3 the Parliament of Canada is authorized to legislate on the same subject. There is therefore no such inconsistency as was suggested.

[1895] *A. C.* *p.* 222.

The learned Chief Justice of the Supreme Court was much pressed by the consideration that there is an inherent right in a Legislature to repeal its own legislative acts and that "every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted." He returns to this point more than once in the course of his judgment, and lays down as a maxim of constitutional construction that an inherent right to do so cannot be deemed to be withheld from a legislative body having its origin in a written constitution, unless the constitution in express words takes away the right, and he states it as his opinion that in construing the Manitoba Act the Court ought to proceed on this principle, and to hold the Legislature of that province to have absolute powers over its own legislation, untrammelled by any appeal to federal authority, unless it could find some restriction of its rights in that respect in express terms in the Constitutional Act.

Their Lordships are unable to concur in the view that there is any presumption which ought to influence the mind one way or the other. It must be remembered that the Provincial Legislature is not in all respects supreme within the province. Its legislative power is strictly limited. It can deal only with matters declared to be within its cognizance by the British North

America Act as varied by the Manitoba Act. In all other cases legislative authority rests with the Dominion Parliament. In relation to the subjects specified in sect. 92 of the British North America Act, and not falling within those set forth in sect. 91, the exclusive power of the Provincial Legislature may be said to be absolute. But this is not so as regards education, which is separately dealt with and has its own code both in the British North America Act and in the Manitoba Act. It may be said to be anomalous that such a restriction as that in question should be imposed on the free action of a Legislature, but is it more anomalous than to grant to a minority who are aggrieved by legislation an appeal from the Legislature to the Executive Authority? And yet this right is expressly and beyond all controversy conferred. If, upon the natural construction of the language used, it should appear that an appeal was permitted under circumstances involving a fetter upon the power of a Provincial Legislature to repeal its own enactments, their Lordships see no justification for a leaning against that construction, nor do they think it makes any difference whether the fetter is imposed by express words or by necessary implication.

[1895] *A. C.* *p.* 223.

In truth, however, to determine that an appeal lies to the Governor-General in Council in such a case as the present does not involve the proposition that the Provincial Legislature was unable to repeal the laws which it had passed. The validity of the repealing Act is not now in question, nor that it was effectual. If the decision be favourable to the appellants the consequence, as will be pointed out presently, will by no means necessarily be the repeal of the Acts of 1890 or the re-enactment of the prior legislation.

Bearing in mind the circumstances which existed in 1870, it does not appear to their Lordships an extravagant notion that in creating a Legislature for the province with limited powers it should have been thought expedient, in case either Catholics or Protestants became preponderant, and rights which had come into existence under different circumstances were interfered with, to give the Dominion Parliament power to legislate upon matters of education so far as was necessary to protect the Protestant or Catholic minority as the case might be.

Taking it then to be established that the 2nd sub-section of sect. 22 of the Manitoba Act extends to rights and privileges of the Roman Catholic minority acquired by legislation in the province after the Union, the next question is whether any such right or privilege has been affected by the Acts of 1890? In

[1895] *A. C.* *p.* 224.

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order to answer this question it will be necessary to examine somewhat more closely than has hitherto been done the system established by the earlier legislation as well as the change effected by those Acts.

The Manitoba School Act of 1871 provided for a Board of Education of not less than ten nor more than fourteen members, of whom one half were to be Protestants and the other half Catholics. The two sections of the board might meet at any time separately. Each section was to choose a chairman, and to have under its control and management the discipline of the schools of the section. One of the Protestant members was to be appointed Superintendent of the Protestant schools, and one of the Catholic members Superintendent of the Catholic schools, and these two were to be the joint secretaries of the board, which was to select the books to be used in the schools, except those having reference to religion or morals, which were to be prescribed by the sections respectively. The legislative grant for common school education was to be appropriated, one moiety to support the Protestant, the other moiety the Catholic schools. Certain districts in which the population was mainly Catholic were to be considered Catholic school districts, and certain other districts where the population was mainly Protestant were to be considered Protestant school districts. Every year a meeting of the male inhabitants of each district, summoned by the Superintendent of the section to which the district belonged, was to appoint trustees, and to decide whether their contributions to the support of the school were to be raised by subscription, by a collection of a rate per scholar, or by assessment on the property of the district. They might also decide to erect a school house, and that the cost of it should be raised by assessment. In case the father or guardian of a school child was a Protestant in a Catholic district or vice versa, he might send the child to the school of the nearest district of the other section, and in case he contributed to the school the child attended a sum equal to what he would have been bound to pay if he had belonged to that district, he was exempt from payment to the school of the district in which he lived.

Acts amending the education law in some respects were passed in subsequent years, but it is not necessary to refer to them, as in 1881 the Act of 1871 and these amending Acts were repealed. The Manitoba School Act, 1881, followed the same general lines as that of 1871. The number of the Board of Education was fixed at not more than twenty-one, of whom twelve were to be

[1895] *A. C.* *p.* 225.

Protestants and nine Catholics. If a less number were appointed the same relative proportion was to be observed. The board as before was to resolve itself into two sections, Protestant and Catholic, each of which was to have the control of the schools of its section, and all the books to be used in the schools under its control were now to be selected by each section. There were to be as before a Protestant and a Catholic Superintendent. It was provided that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and Catholic district might include the same territory in whole or in part. The sum appropriated by the legislature for common school purposes was to be divided between the Protestant and Roman Catholic sections of the board in proportion to the number of children between the ages of five and fifteen residing in the various Protestant and Roman Catholic school districts in the province where schools were in operation. With regard to local assessments for school purposes it was provided that the ratepayers of a school district should pay their respective assessments to the schools of their respective denominations, and in no case was a Protestant ratepayer to be obliged to pay for a Catholic school, or a Catholic ratepayer for a Protestant school.

The scheme embodied in this Act was modified in some of its details by later Acts of the Legislature, but they did not affect in substance the main features to which attention has been called. While traces of the increase of the Protestant relatively to the Catholic population may be seen in the course which legislation took, the position of the Catholic and Protestant portions of the community in relation to education was not substantially altered, though the State aid which at the outset was divided equally between them had of course to be adjusted and made proportionate to the school population which each supplied.

Their Lordships pass now to the Department of Education and Public Schools Acts of 1890, which certainly wrought a great change. Under the former of these Roman Catholics were not entitled as such to any representation on the Board of Education or on the Advisory Board, which was to authorize text books for the use of pupils and to prescribe the forms of religious exercises to be used in schools. All Protestant and Catholic school districts were to be subject to the provisions of the Public Schools Act. The public schools were all to be free, and to be

[1895] *A. C.* p. 226.

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entirely non-sectarian. No religious exercises were to be allowed unless conducted according to the regulations of the Advisory Board, and with the authority of the school trustees for the district. It was made the duty of the trustees to take possession of all public school property which had been acquired or given for public school purposes in the district. The municipal council of every city, town, and village, was directed to levy and collect upon the taxable property within the municipality such sums as might be required by the public school trustees for school purposes. No municipal council was to have the right to exempt any property whatever from school taxation. And it was expressly enacted that any school not conducted according to all the provisions of the Act, or the regulations of the Department of Education, or the Advisory Board, should not be deemed a public school within the meaning of the law, and that such school should not participate in the legislative grant.

With the policy of these Acts their Lordships are not concerned, nor with the reasons which led to their enactment. It may be that as the population of the province became in proportion more largely Protestant, it was found increasingly difficult, especially in sparsely populated districts, to work the system inaugurated in 1871, even with the modifications introduced in later years. But whether this be so or not is immaterial. The sole question to be determined is whether a right or privilege which the Roman Catholic minority previously enjoyed has been affected by the legislation of 1890. Their Lordships are unable to see how this question can receive any but an affirmative answer. Contrast the position of the Roman Catholics prior and subsequent to the Acts from which they appeal. Before these passed into law there existed denominational schools, of which the control and management were in the hands of Roman Catholics, who could select the books to be used and determine the character of the religious teaching. These schools received their proportionate share of the money contributed for school purposes out of the general taxation of the province, and the money raised for these purposes by local assessment was, so far as it fell upon Catholics, applied only towards the support of Catholic schools. What is the position of the Roman Catholic minority under the Acts of 1890? Schools of their own denomination, conducted according to their views, will receive no aid from the State. They must depend entirely for their support upon the contributions of the Roman Catholic community, while the taxes out of which State aid is granted to the schools pro-

[1895] *A. C.* *p.* 227.

vided for by the statute fall alike on Catholics and Protestants. Moreover, while the Catholic inhabitants remain liable to local assessment for school purposes, the proceeds of that assessment are no longer destined to any extent for the support of Catholic schools, but afford the means of maintaining schools which they regard as no more suitable for the education of Catholic children than if they were distinctively Protestant in their character.

In view of this comparison it does not seem possible to say that the rights and privileges of the Roman Catholic minority in relation to education which existed prior to 1890 have not been affected.

Taschereau, J., says that the legislation of 1890 having been irrevocably held to be intra vires cannot have "illegally" affected any of the rights or privileges of the Catholic minority. But the word "illegally" has no place in the sub-section in question. The appeal is given if the rights are in fact affected.

It is true that the religious exercises prescribed for public schools are not to be distinctively Protestant, for they are to be "non-sectarian," and any parent may withdraw his child from them. There may be many too who share the view expressed in one of the affidavits in *Barrett's Case* (1), that there should not be any conscientious objections on the part of Roman Catholics to attend such schools, if adequate means be provided elsewhere of giving such moral and religious training as may be desired. But all this is not to the purpose. As a matter of fact the objection of Roman Catholics to schools such as alone receive State aid under the Act of 1890 is conscientious and deeply rooted. If this had not been so, if there had been a system of public education acceptable to Catholics and Protestants alike, the elaborate enactments which have been the subject of so much controversy and consideration would have been unnecessary. It is notorious that there were acute differences of opinion between Catholics and Protestants on the education question prior to 1870. This is recognised and emphasised in almost every line of those enactments. There is no doubt either what the points of difference were, and it is in the light of these that the 22nd section of the Manitoba Act of 1870, which was in truth a Parliamentary compact, must be read.

[1895] *A. C.* *p.* 228.

For the reasons which have been given their Lordships are of opinion that the 2nd sub-section of sect. 22 of the Manitoba Act is the governing enactment, and that the appeal to the Governor-

(1) [1892] A. C. 445, *ante*, p. 421.

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General in Council was admissible by virtue of that enactment, on the grounds set forth in the memorials and petitions, inasmuch as the Acts of 1890 affected rights or privileges of the Roman Catholic minority in relation to education within the meaning of that sub-section. The further question is submitted whether the Governor-General in Council has power to make the declarations or remedial orders asked for in the memorials or petitions, or has any other jurisdiction in the premises. Their Lordships have decided that the Governor-General in Council has jurisdiction, and that the appeal is well founded; but the particular course to be pursued must be determined by the authorities to whom it has been committed by the statute. It is not for this tribunal to intimate the precise steps to be taken. Their general character is sufficiently defined by the 3rd sub-section of sect. 22 of the Manitoba Act. It is certainly not essential that the statutes repealed by the Act of 1890 should be re-enacted, or that the precise provisions of these statutes should again be made law. The system of education embodied in the Acts of 1890 no doubt commends itself to, and adequately supplies the wants of the great majority of the inhabitants of the province. All legitimate ground of complaint would be removed if that system were supplemented by provisions which would remove the grievance upon which the appeal is founded, and were modified so far as might be necessary to give effect to these provisions.

Their Lordships will humbly advise Her Majesty that the questions submitted should be answered in the manner indicated by the views which they have expressed.

There will be no costs of this appeal.

Solicitors for appellants: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for respondent: *Freshfields & Williams.*

J. C.*
1895
Aug. 1, 2, 6, 7.
1896
May 9.

ONTARIO *v.* CANADA [1896], A. C. 348.
(ONTARIO LIQUOR LICENSE ACT.)

ATTORNEY-GENERAL FOR ONTARIO . . APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION, AND THE DISTILLERS AND BREWERS' ASSOCIATION OF ONTARIO . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, ss. 91, 92—*Distribution of Legislative Powers—Liquor Laws—Power of Prohibition—Canada Temperance Act,* 1886—*Ontario Act* (53 *Vict. c.* 56), *s.* 18.

The general power of legislation conferred upon the Dominion Parliament by s. 91 of the British North America Act, 1867, in supplement of its therein enumerated powers, must be strictly confined to such matters as are unquestionably of national interest and importance; and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion.

Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or provincial legislature.

Accordingly the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old provincial Act of 1864 (27 & 28 Vict. c. 18) was ultra vires the Dominion. Its own prohibitory provisions are, however, valid when duly brought into operation in any provincial area, as relating to the peace, order, and good government of Canada;

Russell v. *Reg.* (7 App. Cas. 829) followed;

but not as regulating trade and commerce within s. 91, sub-s. 2, of the Act of 1867;

Citizens' Insurance Co. v. *Parsons* (7 App. Cas. 98) distinguished and *Municipal Corporation of Toronto* v. *Virgo* (ante, p. 93) followed.

Held, also, that the local liquor prohibitions authorized by the Ontario Act (53 Vict. c. 56), s. 18, are within the powers of the provincial legislature. But they are inoperative in any locality which adopts the provisions of the Dominion Act of 1886.

Appeal by special leave from a judgment of the Supreme Court (Jan. 15, 1895) consisting of Strong, C.J., Fournier, Gwynne, Sedgwick, and King, JJ. Under the Supreme and Exchequer Courts Act (Revised Stat. Can. c. 135), as amended by Dominion Act

* *Present:* LORD HALSBURY, L.C., LORD HERSCHELL, LORD WATSON, LORD DAVEY, and SIR RICHARD COUCH.

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(54 & 55 Vict. c. 25), s. 4, the Governor-General of Canada, by Order in Council (Oct. 26, 1893), submitted to the Supreme Court of Canada the following questions :—

(1.) Has a provincial legislature jurisdiction to prohibit the sale within the province of spirituous, fermented, or other intoxicating liquors?

(2.) Or has the legislature such jurisdiction regarding such portions of the province as to which the Canada Temperance Act is not in operation?

(3.) Has a provincial legislature jurisdiction to prohibit the manufacture of such liquors within the province?

(4.) Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province?

(5.) If a provincial legislature has not jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such legislature jurisdiction to prohibit the sale by retail, according to the definition of a sale by retail either in statutes in force in the province at the time of confederation, or any other definition thereof?

(6.) If a provincial legislature has a limited jurisdiction only as regards the prohibition of sales, has the legislature jurisdiction to prohibit sales subject to the limits provided by the several sub-sections of the 99th section of the Canada Temperance Act, or any of them (Revised Statutes of Canada, 49 Vict. c. 106, s. 99)?

(7.) Has the Ontario Legislature jurisdiction to enact s. 18 of Ontario Act, 53 Vict. c. 56, intituled "An Act to improve the Liquor Licence Acts," as said section is explained by Ontario Act, 54 Vict. c. 46, intituled "An Act respecting local option in the matter of liquor selling"?

[1896] *A. C.* *p.* 350.

Sect. 18, referred to in the last of the said questions, is as follows:—

"18. Whereas the following provision of this section was at the date of confederation in force as a part of the Consolidated Municipal Act (29th and 30th Victoria, chapter 51, section 249, sub-section 9), and was afterwards re-enacted as sub-section 7 of section 6 of 32nd Victoria, chapter 32, being the Tavern and Shop Licence Act of 1868, but was afterwards omitted in subsequent consolidations of the Municipal and the Liquor Licence Acts, similar provisions as to local prohibition being contained in the Temperance Act of 1864, 27th and 28th Victoria, chapter 18; and the said last-mentioned Act having been repealed in municipalities where not in force by the Canada Temperance Act, it is expedient that municipalities should have the powers by them formerly possessed; it is hereby enacted as follows:—

"The council of every township, city, town, and incorporated village may pass by-laws for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any tavern, inn, or other house or place of public entertainment, and for prohibiting altogether the sale thereof in shops and places other than houses of public entertainment. Provided that the by-law before the final passing thereof has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act. Provided further that nothing in this section contained shall be construed into an exercise of jurisdiction by the Legislature of the province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this province purported to repeal."

Act 54 Vict. c. 46, referred to above, declares that s. 18 was not intended to affect the provisions of s. 252 of the Consolidated Municipal Act, being Canada Act, 29 & 30 Vict. c. 51.

A majority of the Supreme Court, after hearing counsel for the Dominion, the provinces of Ontario, Quebec, and Manitoba, and also, under s. 37, sub-s. 4, of the Supreme and Exchequer Courts Act for the Distillers and Brewers' Association of Ontario, answered all the questions in the negative. Strong, C.J., and Fournier, J., while agreeing in a negative answer to questions 3 and 4, answered the remainder in the affirmative.

[1896] *A. C.* p. 351.

The case in the Court below is reported in 24 Sup. Ct. Can. Reports, p. 170.

Maclaren, Q.C. (of the Colonial Bar), and *Haldane, Q.C.*, for the appellant.

Newcombe, Q.C. (of the Colonial Bar), and *Loehnis*, for the Attorney-General for the Dominion.

Blake, Q.C., and *Wallace Nesbitt* (both of the Colonial Bar), for the Distillers and Brewers' Association.

Maclaren, Q.C., and *Haldane, Q.C.*, contended that s. 18 of the Ontario Act of 1890 was authorized as relating to a subject comprised within the term "municipal institutions" in s. 92, sub-s. 8, of the British North America Act, 1867. *Citizens' Insurance Co.* v. *Parsons* (1) lays down the rule that provincial legislation is valid if it relates to the enumerated subjects in s. 92, and is not overridden by the enumerated subjects in s. 91. It was admitted that a provincial legislature could not give to a municipality control over any of the subjects mentioned in s. 91. But a power to create municipal

(1) 7 App. Cas. 96, *ante*, p. 267.

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institutions must involve a power to give them such powers as usually belong to such bodies. In Canadian legislation, prior to the Imperial Act of 1867, municipal institutions included a large number of subjects not specifically enumerated in s. 92. The expression had acquired a well-defined legislative meaning, and the term was used in s. 92 in the sense so acquired. The Act of 1867 was founded on the Quebec resolutions, and expressions which came textually therefrom should be interpreted by the light of Canadian legislation.

[THE LORD CHANCELLOR. Then how do you define that technical meaning?]

It meant the conferring on them such powers as under Canadian legislation had been understood to belong to them; except such as were assigned to the Dominion under s. 91.

[LORD HERSCHELL. Canadian legislation varied. Municipal institutions had different powers in Canada from what they had in Nova Scotia and New Brunswick.]

[1896] *A. C.* *p.* 352.

Reference was made to *Hodge* v. *Reg.* (1) and *Russell* v. *Reg.* (2), and to a series of Canadian statutes passed before 1867, being, as respects those relating to Upper Canada, 12 Vict. c. 81; 16 Vict. c. 184; 22 Vict. c. 99, s. 245; Cons. Stat. Upper Canada of 1859, c. 54, s. 246; 29 & 30 Vict. c. 51; and as relating to Lower Canada—16 Vict. c. 214; 18 Vict. c. 100, s. 23; 19 & 20 Vict. c. 101, ss. 8, 11; 20 Vict. c. 129, s. 37; Cons. Stat. L. C. 1861, c. 24, s. 26, sub-ss. 10, 15, and s. 27, sub-s. 16. Reference was also made to 27 & 28 Vict. c. 18; 29 & 30 Vict. c. 32; Revised Stat. Nova Scotia, c. 75; Public Stat. of New Brunswick (1854), c. 15. The expression has also been interpreted in decided cases: see *Slavin* v. *Corporation of Orillia* (3); *Reg.* v. *Taylor* (4); *Keefe* v. *McLennan* (5); *In re Local Option Act* (6); *Corporation of Huntingdon* v. *Moir* (7); *Lepine* v. *Laurent* (8); *Huson* v. *S. Norwich* (9). Sub-sects. 9, 13, and 16 of s. 92 were also relied on. It was further contended that the Act in question was valid unless and until the Dominion Parliament should legislate in a manner which would override its provisions. It does not conflict with Canada Temperance Act, 1878, for it could only apply to places where that Act has not been put in force. Reference was made to *L'Union St. Jaques de Montréal* v. *Bélisle* (10); *Attorney-General of Ontario* v. *Attorney-General for Canada* (11); *Bank of Toronto* v.

(1) 9 App. Cas. 117, *ante*, p. 333.
(2) 7 App. Cas. 829, *ante*, p. 310.
(3) 36 U. C. Q. B. 159; S.C. 1 Cart. 688.
(4) 36 U. C. Q. B. 183.
(5) 2 Cart. 400, 409.
(6) 18 Ont. App. R. 572.
(7) 7 Montreal L. R. Q. B. 281.
(8) 14 Legal News, 369.
(9) 24 Sup. Ct. Can. Rep. 145.
(10) L. R. 6 P. C. 31, *ante*, p. 206.
(11) [1894] A. C. 189, *ante*, p. 447.

Lambe (1). The general result of the authorities is that the words "regulation of trade and commerce" in s. 91 mean general regulation in a broad sense; not of such specific matters as are involved in the Act in question, nor of any minute details, nor any regulation of matters of a merely local nature or private or peculiar to any particular trade.

Newcombe, Q.C., contended that a provincial legislature has no authority to prohibit the sale, manufacture, or importation of spirituous, fermented, or other intoxicating liquors. Further, that it has no authority to prohibit the sale of such liquors either by wholesale or retail, or subject to the exemptions established by the Canada Temperance Act, s. 99. The subject of this reference is prohibition. *Russell* v. *Reg.* (2) ruled that prohibition as dealt with by the Canada Temperance Act was excluded from provincial authority.

[1896] *A. C.* p. 353.

[LORD HERSCHELL. No; not while the provincial legislature deals with the matter locally.]

Prohibition of the liquor traffic does not fall within any of the subjects enumerated in s. 92. The exclusive power with regard to municipal institutions only enables the legislatures to establish regulations for carrying on such institutions. Any authority which the legislatures can confer upon them must be derived from or have relation to the other subjects enumerated in s. 92, none of which include a power to prohibit. They can prescribe the mode in which the traffic may be carried on, but they cannot prohibit it. Subsect. 16, s. 92, relates to "local or private" matters, not provincial. On the other hand, prohibition strictly relates to matters within the exclusive power of the Dominion Parliament. It affects the peace, order, and good government of Canada in relation to matters not coming within those assigned by s. 92 to the provinces. To the Dominion is assigned authority to regulate trade and commerce. See *City of Fredericton* v. *Reg.* (3), *Russell* v. *Reg.* (2), and *Tennant* v. *Union Bank* (4). It was contended that whether or not regulation involves prohibition, if the provinces may prohibit, the Dominion has nothing left to regulate. The provincial power of regulating a particular trade recognised in *Hodge* v. *Reg.* (5) must not be pushed so as to conflict with Dominion legislation; for wherever the two legislatures conflict that of the Dominion must be paramount. Here the field of legislation, that is with regard to the prohibition of the liquor traffic, is already occupied by the Canada Temperance

(1) 12 App. Cas. 575, *ante*, p. 378.
(2) 7 App. Cas. 829, *ante*, p. 310.
(3) 3 Sup. Ct. Can. 505.
(4) [1894] A. C. 45, *ante*, p. 433.
(5) 9 App. Cas. 117, *ante*, p. 333.

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Act, and there is therefore no room for a provincial law, for the interference of the province would interfere with the legislation of the Dominion.

[LORD WATSON. Where the Temperance Act is not adopted, there is no law as yet applicable, and there the field is not covered.]

The legislation exists which at any moment the community may bring into force.

[1896] *A. C.* *p.* 354.

Blake, Q.C., contended that the provinces have no legislative authority except in the subjects enumerated in s. 92, according to the true construction of the British North America Act as ascertained by the Privy Council. On any matter so enumerated the provinces have no authority in any case wherein, or to any extent whereby, the exercise of such authority would interfere with the exercise by the Dominion of any authority comprised within any of the sub-sections of s. 91. Again, the subject of the prohibition of retail selling of intoxicating liquors is not comprised within s. 92, according to the same authoritative construction; and it follows that a fortiori the prohibition of wholesale selling, or manufacturing or importing, is not so comprised. Then it is settled that each of these subjects, being without the scope of s. 92, is within the general authority of the Dominion conferred by s. 91 for peace, order, and good government. The regulation of trade and commerce is placed by s. 91 under the exclusive authority of the Dominion, the object being to place the trade of the various provinces under the general control of the central authority, and thus effect uniformity as far as possible, and also enable the Dominion to obtain by an indirect system of taxation the amounts necessary to enable it to discharge the national obligations. The customs and excise duties on liquor are a substantial and necessary part of the fiscal resources of the Dominion, and it was not intended that those resources should be curtailed or abolished by the provincial legislatures throughout their jurisdiction. Exclusive authority over the liquor trade in its trade and revenue aspects means an authority to prevent any rival control over them which might impede the purposes for which such exclusive authority was granted. Besides, there is a broad distinction between an authority to prohibit

[1896] *A. C.* *p.* 355.

a trade and an authority to regulate it, and even if, according to the appellant's argument, the provincial legislature could, under the sub-section relating to municipal institutions, regulate it, the power to prohibit nevertheless exclusively belongs to the Dominion. Sect. 18 of the Ontario Act purports to deal with a subject which comes under s. 91, sub-s. 2. It conflicts with the Canada Temperance Act, which covers the whole field of legislation, and therefore with the paramount authority of the Dominion, and, moreover, cannot be validated as a

revival of pre-confederation law. Before confederation each province had full legislative authority, and one of them tried the experiment of entrusting municipalities with prohibitive power. But neither in the practice of the four provinces, nor in the nature of the subject, nor in the methods of the United Kingdom, is there any established meaning attached to the phrase "municipal institutions" which includes the subject of s. 18. Reference was made to *Reg.* v. *Justices of Kings* (1) and *Severn* v. *Reg.* (2), and to the cases cited by the appellant.

Maclaren, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON. Their Lordships think it expedient to deal, in the first instance, with the seventh question, because it raises a practical issue, to which the able arguments of counsel on both sides of the Bar were chiefly directed, and also because it involves considerations which have a material bearing upon the answers to be given to the other six questions submitted in this appeal. In order to appreciate the merits of the controversy, it is necessary to refer to certain laws for the restriction or suppression of the liquor traffic which were passed by the Legislature of the old province of Canada before the Union, or have since been enacted by the Parliament of the Dominion, and by the Legislature of Ontario respectively.

At the time when the British North America Act of 1867 came into operation, the statute book of the old province contained two sets of enactments applicable to Upper Canada, which, though differing in expression, were in substance very similar.

[1896] *A. C.* p. 356.

The most recent of these enactments were embodied in the Temperance Act, 1864 (27 & 28 Vict. c. 18), which conferred upon the municipal council of every county, town, township, or incorporated village, "besides the powers at present conferred on it by law," power at any time to pass a by-law prohibiting the sale of intoxicating liquors, and the issue of licences therefor, within the limits of the municipality. Such by-law was not to take effect until submitted to and approved by a majority of the qualified electors; and provision was made for its subsequent repeal in deference to an adverse vote of the electors.

The previous enactments relating to the same subject, which were in force at the time of the Union, were contained in the Consolidated Municipal Act, 29 & 30 Vict. c. 51. They empowered

(1) 2 Pugs. 535. (2) 2 Sup. Ct. Can. 70.

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the council of every township, town, and incorporated village, and the commissioners of police in cities, to make by-laws for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any inn or other house of public entertainment; and for prohibiting totally the sale thereof in shops and places other than houses of public entertainment; provided the by-law, before the final passing thereof, had been duly approved by the electors of the municipality in the manner prescribed by the Act. After the Union, the Legislature of Ontario inserted these enactments in the Tavern and Shop Licence Act, 32 Vict. c. 32. They were purposely omitted from subsequent consolidations of the Municipal and Liquor Licence Acts; and, in the year 1886, when the Canada Temperance Act was passed by the Parliament of Canada, there was no provincial law authorizing the prohibition of liquor sales in Ontario save the Temperance Act, 1864.

The Canada Temperance Act of 1886 (Revised Statutes of Canada, 49 Vict. c. 106) is applicable to all the provinces of the Dominion. Its general scheme is to give to the electors of every county or city the option of adopting, or declining to adopt, the provisions of the second part of the Act, which make it unlawful for any person "by himself, his clerk, servant or agent, to expose or keep for sale, or directly or indirectly, on any pretence or upon any device, to sell or barter, or in consideration of the purchase of any other property, give to any other person any intoxicating liquor." It expressly declares that no violation of these enactments shall be made lawful by reason of any licence of any description whatsoever. Certain relaxations are made in the case of sales of liquor for sacramental or medicinal purposes, or for exclusive use in some art, trade, or manufacture. The prohibition does not extend to manufacturers, importers, or wholesale traders who sell liquors in quantities above a specified limit, when they have good reason to believe that the purchasers will forthwith carry their purchase beyond the limits of the county or city, or of any adjoining county or city in which the provisions of the Act are in force.

[1896] *A. C.* *p.* 357.

For the purpose of bringing the second part of the Act into operation an order of the Governor-General of Canada in Council is required. The order must be made on the petition of a county or city, which cannot be granted until it has been put to the vote of the electors of such county or city. When a majority of the votes polled are adverse to the petition, it must be dismissed; and no similar application can be made within the period of three years from the day on which the poll was taken. When the vote is in favour of the petition, and is followed by an Order in Council, one-fourth of the

qualified electors of the county or city may apply to the Governor-General in Council for a recall of the order, which is to be granted in the event of a majority of the electors voting in favour of the application. Power is given to the Governor-General in Council to issue in the like manner, and after similar procedure, an order repealing any by-law passed by any municipal council for the application of the Temperance Act of 1864.

The Dominion Act also contains an express repeal of the prohibitory clauses of the provincial Act of 1864, and of the machinery thereby provided for bringing them into operation, (1.) as to every municipality within the limits of Ontario in which, at the passing of the Act of 1886, there was no municipal by-law in force, (2.) as to every municipality within these limits in which a prohibitive by-law then in force shall be subsequently repealed under the provisions of either Act, and (3.) as to every municipality having a municipal by-law which is included in the limits of, or has the same limits with, any county or city in which the second part of the Canada Temperance Act is brought into force before the repeal of the by-law, which by-law, in that event, is declared to be null and void.

[1896] *A. C.* p. 358.

With the view of restoring to municipalities within the province whose powers were affected by that repeal the right to make by-laws which they had possessed under the law of the old province, the Legislature of Ontario passed s. 18 of 53 Vict. c. 56, to which the seventh question in this case relates. The enacting words of the clause are introduced by a preamble which recites the previous course of legislation, and the repeal by the Canada Temperance Act of the Upper Canada Act of 1864 in municipalities where not in force, and concludes thus: "it is expedient that municipalities should have the powers by them formerly possessed." The enacting words of the clause, with the exception of one or two changes of expression which do not affect its substance, are a mere reproduction of the provisions, not of the Temperance Act of 1864, but of the kindred provisions of the Municipal Act (29 & 30 Vict. c. 51), which had been omitted from the consolidated statutes of the province. A new proviso is added, to the effect that "nothing in this section contained shall be construed into an exercise of jurisdiction by the province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this province purported to repeal. The Legislature of Ontario subsequently passed an Act (54 Vict. c. 46) for the purpose of explaining that s. 18 was not meant to repeal by implication certain provisions of the Municipal Act (29 & 30 Vict. c. 51), which limit its application to retail dealings.

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The seventh question raises the issue, whether, in the circumstances which have just been detailed, the provincial legislature had authority to enact s. 18. In order to determine that issue, it becomes necessary to consider, in the first place, whether the Parliament of Canada had jurisdiction to enact the Canada Temperance Act; and, if so, to consider in the second place, whether, after that Act became the law of each province of the Dominion, there yet remained power with the Legislature of Ontario to enact the provisions of s. 18.

[1896] *A. C.* *p.* 359.

The authority of the Dominion Parliament to make laws for the suppression of liquor traffic in the provinces is maintained, in the first place, upon the ground that such legislation deals with matters affecting "the peace, order, and good government of Canada," within the meaning of the introductory and general enactments of s. 91 of the British North America Act; and, in the second place, upon the ground that it concerns "the regulation of trade and commerce," being No. 2 of the enumerated classes of subjects which are placed under the exclusive jurisdiction of the Federal Parliament by that section. These sources of jurisdiction are in themselves distinct, and are to be found in different enactments.

It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by s. 91 might, occasionally and incidentally, involve legislation upon matters which are primâ facie committed exclusively to the provincial legislatures by s. 92. In order to provide against that contingency, the concluding part of s. 91 enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." It was observed by this Board in *Citizens' Insurance Co. of Canada* v. *Parsons* (1) that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature. It also appears to their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-

[1896] *A. C.* *p.* 360.

(1) 7 App. Cas. 108, *ante*, p. 277.

sections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens' Insurance Co. of Canada* v. *Parsons* (1) and in *Cushing* v. *Dupuy* (2); and it has been recognised by this Board in *Tennant* v. *Union Bank of Canada* (3) and in *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (4).

The general authority given to the Canadian Parliament by the introductory enactments of s. 91 is "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces"; and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion,

[1896] *A. C.* p. 361.

(1) 7 App. Cas. at pp. 108, 109, *ante*, p. 277.
(2) 5 App. Cas. 409, 415, *ante*, p. 259.
(3) [1894] A. C. 31, 46, *ante*, p. 445.
(4) [1894] A. C. 189, 200, *ante*, p. 456.

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there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures (1).

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In construing the introductory enactments of s. 91, with respect to matters other than those enumerated, which concern the peace, order, and good government of Canada, it must be kept in view that s. 94, which empowers the Parliament of Canada to make provision for the uniformity of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick does not extend to the province of Quebec; and also that the Dominion legislation thereby authorized is expressly declared to be of no effect unless and until it has been adopted and enacted by the provincial legislature. These enactments would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of s. 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole. Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion.

[1896] *A. C.* p. 362.

The judgment of this Board in *Russell* v. *Reg.* (2) has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order, and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament. In that case the controversy related to the validity of the Canada Temperance Act of 1878; and neither the Dominion nor the Provinces were represented in the argument. It arose between a private prosecutor and a person who had been convicted, at his instance, of violating the provisions of the

(1) Appl. *Montreal* v. *Montreal Street Railway, post,* p. 720.

(2) 7 App. Cas. 829, *ante,* p. 310.

Canadian Act within a district of New Brunswick, in which the prohibitory clauses of the Act had been adopted. But the provisions of the Act of 1878 were in all material respects the same with those which are now embodied in the Canada Temperance Act of 1886; and the reasons which were assigned for sustaining the validity of the earlier, are, in their Lordships' opinion, equally applicable to the later Act. It therefore appears to them that the decision in *Russell* v. *Reg.* (1) must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order, and good government of Canada.

That point being settled by decision, it becomes necessary to consider whether the Parliament of Canada had authority to pass the Temperance Act of 1886 as being an Act for the "regulation of trade and commerce" within the meaning of No. 2 of s. 91. If it were so, the Parliament of Canada would, under the exception from s. 92 which has already been noticed, be at liberty to exercise its legislative authority, although in so doing it should interfere with the jurisdiction of the provinces. The scope and effect of No. 2 of s. 91 were discussed by this Board at some length in *Citizens' Insurance Co.* v. *Parsons* (2), where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade. Their Lordships do not find it necessary to reopen that discussion in the present case. The object of the Canada Temperance Act of 1886 is, not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view, their Lordships are unable to regard the prohibitive enactments of the Canadian statute of 1886 as regulations of trade and commerce. They see no reason to modify the opinion which was recently expressed on their behalf by Lord Davey in *Municipal Corporation of the City of Toronto* v. *Virgo* (3) in these terms: "Their Lordships think there is marked distinction to

[1896] *A. C.* p. 363.

(1) 7 App. Cas. 829, *ante*, p. 321. (2) 7 App. Cas. 96, *ante*, p. 282.
(3) (1896) A. C. 98.

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be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

The authority of the Legislature of Ontario to enact s. 18 of 53 Vict. c. 56, was asserted by the appellant on various grounds. The first of these, which was very strongly insisted on, was to the effect that the power given to each province by No. 8 of s. 92 to create municipal institutions in the province necessarily implies the right to endow these institutions with all the administrative functions which had been ordinarily possessed and exercised by them before the time of the Union. Their Lordships can find nothing to support that contention in the language of s. 92, No. 8, which, according to its natural meaning, simply gives provincial legislatures the right to create a legal body for the management of municipal affairs. Until confederation, the Legislature of each province as then constituted could, if it chose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the Parliament of Canada. Since its date a provincial Legislature cannot delegate any power which it does not possess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of s. 92 other than No. 8.

[1896] *A. C.* p. 364.

Their Lordships are likewise of opinion that s. 92, No. 9, does not give provincial legislatures any right to make laws for the abolition of the liquor traffic. It assigns to them "shop, saloon, tavern, auctioneer and other licences, in order to the raising of a revenue for provincial, local or municipal purposes." It was held by this Board in *Hodge* v. *Reg.* (1) to include the right to impose reasonable conditions upon the licencees which are in the nature of regulation; but it cannot, with any show of reason, be construed as authorizing the abolition of the sources from which revenue is to be raised.

The only enactments of s. 92 which appear to their Lordships to have any relation to the authority of provincial legislatures to make laws for the suppression of the liquor traffic are to be found in Nos. 13 and 16, which assign to their exclusive jurisdiction, (1.) "property and civil rights in the province," and (2.) "generally all matters of a merely local or private nature in the province." A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which

(1) 9 App. Cas. 117, *ante*, p. 345.

would be the subject-matter of the transactions if they were not prohibited, and also the civil rights of persons in the province. It is not impossible that the vice of intemperance may prevail in particular localities within a province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling primâ facie within No. 16. In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province where prohibition was urgently needed. [1896] *A. C.* p. 365.

It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them. In s. 92, No. 16 appears to them to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated (1).

In the able and elaborate argument addressed to their Lordships on behalf of the respondents it was practically conceded that a provincial legislature must have power to deal with the restriction of the liquor traffic from a local and provincial point of view, unless it be held that the whole subject of restriction or abolition is exclusively committed to the Parliament of Canada as being within the regulation of trade and commerce. In that case the subject, in so far at least as it had been regulated by Canadian legislation, would, by virtue of the concluding enactment of s. 91, be excepted from the matters committed to provincial legislatures by s. 92. Upon the assumption that s. 91 (2) does not embrace the right to suppress a trade, Mr. Blake maintained that, whilst the restriction of the liquor traffic may be competently made matter of legislation in a provincial as well as a Canadian aspect, yet the Parliament of Canada has, by enacting the Temperance Act of 1886, occupied the whole possible field of legislation in either aspect, so as completely to exclude legislation by a province. That appears to their Lordships to be the real point of controversy [1896] *A. C.* p. 366.

(1) Disc. *Manitoba* v. *License Holders, post*, p. 578.

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raised by the question with which they are at present dealing; and, before discussing the point, it may be expedient to consider the relation in which Dominion and provincial legislation stand to each other.

It has been frequently recognised by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the Parliament of Canada, in so far as these are within its competency, must override provincial legislation. But the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by s. 92. The repeal of a provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion; and if the existence of such repugnancy should become matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the provincial legislature, but must be submitted to the judicial tribunals of the country. In their Lordships' opinion the express repeal of the old provincial Act of 1864 by the Canada Temperance Act of 1886 was not within the authority of the Parliament of Canada. It is true that the Upper Canada Act of 1864 was continued in force within Ontario by s. 129 of the British North America Act, "until repealed, abolished, or altered by the Parliament of Canada, or by the provincial legislature," according to the authority of that Parliament, "or of that legislature." It appears to their Lordships that neither the Parliament of Canada nor the provincial legislatures have authority to repeal statutes which they could not directly enact. Their Lordships had occasion, in *Dobie* v. *Temporalities Board* (1), to consider the power of repeal competent to the legislature of a province. In that case the Legislature of Quebec had repealed a statute continued in force after the Union by s. 129 which had this peculiarity, that its provisions applied both to Quebec and to Ontario, and were incapable of being severed so as to make them applicable to one of these provinces only. Their Lordships held (2) that the powers conferred "upon the provincial legislatures of Ontario and Quebec to repeal and alter the statutes of the old parliament of the province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867"; and that it was beyond the authority of the Legislature of Quebec to repeal statutory enactments which affected both Quebec and Ontario. The same principle ought, in the opinion of their Lordships, to be

[1896] *A. C.* *p.* 367.

(1) 7 App. Cas. 136, *ante*, p. 293.

(1) 7 App. Cas., *ante*, p. 302.

applied to the present case. The old Temperance Act of 1864 was passed for Upper Canada, or, in other words, for the province of Ontario; and its provisions, being confined to that province only, could not have been directly enacted by the Parliament of Canada. In the present case the Parliament of Canada would have no power to pass a prohibitory law for the province of Ontario; and could therefore have no authority to repeal in express terms an Act which is limited in its operation to that province. In like manner, the express repeal, in the Canada Temperance Act of 1886, of liquor prohibitions adopted by a municipality in the province of Ontario under the sanction of provincial legislation, does not appear to their Lordships to be within the authority of the Dominion Parliament.

The question must next be considered whether the provincial enactments of s. 18 to any, and if so to what, extent come into collision with the provisions of the Canadian Act of 1886. In so far as they do, provincial must yield to Dominion legislation, and must remain in abeyance unless and until the Act of 1886 is repealed by the parliament which passed it.

The prohibitions of the Dominion Act have in some respects an effect which may extend beyond the limits of a province, and they are all of a very stringent character. They draw an arbitrary line, at eight gallons in the case of beer, and at ten gallons in the case of other intoxicating liquors, with the view of discriminating between wholesale and retail transactions. Below the limit, sales within a district which has adopted the Act are absolutely forbidden, except to the two nominees of the Lieutenant-Governor of the province, who are only allowed to dispose of their purchases in small quantities for medicinal and other specified purposes. In the case of sales above the limit the rule is different. The manufacturers of pure native wines, from grapes grown in Canada, have special favour shewn them. Manufacturers of other liquors within the district, as also merchants duly licensed, who carry on an exclusively wholesale business, may sell for delivery anywhere beyond the district, unless such delivery is to be made in an adjoining district where the Act is in force. If the adjoining district happened to be in a different province, it appears to their Lordships to be doubtful whether, even in the absence of Dominion legislation, a restriction of that kind could be enacted by a provincial legislature.

[1896] *A. C.* p. 368.

On the other hand, the prohibitions which s. 18 authorizes municipalities to impose within their respective limits do not appear to their Lordships to affect any transactions in liquor which have not their beginning and their end within the province of Ontario. The first branch of its prohibitory enactments strikes

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against sales of liquor by retail in any tavern, or other house or other place of public entertainment. The second extends to sales in shops and places other than houses of public entertainment; but the context indicates that it is only meant to apply to retail transactions; and that intention is made clear by the terms of the explanatory Act 54 Vict. c. 46, which fixes the line between wholesale and retail at one dozen of liquor in bottles, and five gallons if sold in other receptacles. The importer or manufacturer can sell any quantity above that limit; and any retail trader may do the same, provided that he sells the liquor in the original packages in which it was received by him from the importer or manufacturer.

It thus appears that, in their local application within the province of Ontario, there would be considerable difference between the two laws; but it is obvious that their provisions could not be in force within the same district or province at one and the same time. In the opinion of their Lordships the question of conflict between their provisions which arises in this case does not depend upon their identity or non-identity, but upon a feature which is common to both. Neither statute is imperative, their prohibitions being of no force or effect until they have been voluntarily adopted and applied by the vote of a majority of the electors in a district or municipality. In *Russell* v. *Reg.* (1) it was observed by this Board, with reference to the Canada Temperance Act of 1878, "The Act as soon as it was passed became a law for the whole Dominion, and the enactments of the first part, relating to the machinery for bringing the second part into force, took effect and might be put in motion at once and everywhere within it." No fault can be found with the accuracy of that statement. Mutatis mutandis, it is equally true as a description of the provisions of s. 18. But in neither case can the statement mean more than this, that, on the passing of the Act, each district or municipality within the Dominion or the province, as the case might be, became vested with a right to adopt and enforce certain prohibitions if it thought fit to do so. But the prohibitions of these Acts, which constitute their object and their essence, cannot with the least degree of accuracy be said to be in force anywhere until they have been locally adopted.

[1896] *A. C.* p. 369.

If the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, their Lordships might have been constrained by previous authority to hold that the jurisdiction of the Legislature of Ontario to pass s. 18 or any similar law had been

(1) 7 App. Cas., *ante*, p. 321.

superseded. In that case no provincial prohibitions such as are sanctioned by s. 18 could have been enforced by a municipality without coming into conflict with the paramount law of Canada. For the same reason, provincial prohibitions in force within a particular district will necessarily become inoperative whenever the prohibitory clauses of the Act of 1886 have been adopted by that district. But their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the province of Ontario where the prohibitions of the Canadian Act are not and may never be in force. In a district which has by the votes of its electors rejected the second part of the Canadian Act, the option is abolished for three years from the date of the poll; and it hardly admits of doubt that there could be no repugnancy whilst the option given by the Canadian Act was suspended. The Parliament of Canada has not, either expressly or by implication, enacted that so long as any district delays or refuses to accept the prohibitions which it has authorized the provincial parliament is to be debarred from exercising the legislative authority given it by s. 92 for the suppression of the drink traffic as a local evil. Any such legislation would be unexampled; and it is a grave question whether it would be lawful. Even if the provisions of s. 18 had been imperative, they would not have taken away or impaired the right of any district in Ontario to adopt, and thereby bring into force, the prohibitions of the Canadian Act.

[1896] *A. C.* p. 370.

Their Lordships, for these reasons, give a general answer to the seventh question in the affirmative. They are of opinion that the Ontario Legislature had jurisdiction to enact s. 18, subject to this necessary qualification, that its provisions are or will become inoperative in any district of the province which has already adopted, or may subsequently adopt, the second part of the Canada Temperance Act of 1886.

Their Lordships will now answer briefly, in their order, the other questions submitted by the Governor-General of Canada. So far as they can ascertain from the record, these differ from the question which has already been answered in this respect, that they relate to matters which may possibly become litigious in the future, but have not as yet given rise to any real and present controversy. Their Lordships must further observe that these questions, being in their nature academic rather than judicial, are better fitted for the consideration of the officers of the Crown than of a court of law. The replies to be given to them will necessarily depend upon the circumstances in which they may arise for decision; and these circumstances are in this case left to speculation. It must, therefore,

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ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR THE DOMINION. [1896] *A. C.* *p.* 371.

be understood that the answers which follow are not meant to have, and cannot have, the weight of a judicial determination, except in so far as their Lordships may have occasion to refer to the opinions which they have already expressed in discussing the seventh question.

Answers to questions 1 and 2.—Their Lordships think it sufficient to refer to the opinions expressed by them in disposing of the seventh question.

Answer to question 3.—In the absence of conflicting legislation by the Parliament of Canada, their Lordships are of opinion that the provincial legislatures would have jurisdiction to that effect if it were shewn that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province.

Answer to question 4.—Their Lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament.

Answers to questions 5 and 6.—Their Lordships consider it unnecessary to give a categorical reply to either of these questions. Their opinion upon the points which the questions involve has been sufficiently explained in their answer to the seventh question.

Their Lordships will humbly advise Her Majesty to discharge the order of the Supreme Court of Canada dated January 15, 1895; and to substitute therefor the several answers to the seven questions submitted by the Governor-General of Canada which have been already indicated. There will be no costs of this appeal.

Solicitors for appellant: *Freshfields & Williams.*

Solicitors for first respondent: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for second respondent: *Linklater, Hackwood, Addison & Brown.*

ESQUIMALT *v.* BAINBRIDGE [1896], A. C. 561.

J. C.*
1896
July 9, 28.

ESQUIMALT AND NANAIMO RAILWAY COMPANY . . . . . } DEFENDANTS;

AND

BAINBRIDGE . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Law of British Columbia—Act 47 Vict. c. 14, s. 3—Act 54 Vict. c. 26—Free Miner's Certificate—Construction—Mines and Minerals—Precious Metals.

By s. 3 of the British Columbia Act (47 Vict. c. 14), land was granted to the Dominion Government, the appellant company's predecessor in title, "including all mines, minerals, and substances whatsoever thereupon, therein, and thereunder":—

Held, in an action for wrongful ejectment by the holder of a free miner's certificate under the "British Columbia Placer Mining Act, 1891" (54 Vict. c. 26), applicable to a part of the land granted, that he was entitled to mine for gold and other precious metals thereon, the above words not being sufficiently precise to transfer to the appellants' predecessor the right of the provincial legislature to administer the precious metals in the lands assigned.

Appeal from an order of the Full Court (Aug. 7, 1895), affirming an order of Drake, J. (Oct. 17, 1894), whereby it was adjudged that the respondent was entitled to enter on and mine the lands of the appellants upon complying with the conditions contained in s. 11 of the Placer Mining Act of 1891.

The question in issue was as to the right of the appellants to the mines of precious metals within the belt of land granted to them by the Crown, as represented by the Dominion of Canada, for the purpose of constructing and to aid in the construction of their railway.

The facts are stated in the judgment of their Lordships.

Cozens-Hardy, Q.C., and *W. H. Clay*, for the appellants, contended that the letters patent under the Great Seal of Canada, dated April 21, 1887, under which the Crown, after reciting the local Act 47 Vict. c. 14, and the Dominion Act (47 Vict. c. 6), granted to the appellants the precious metals contained in the lands in suit. According to the true construction of those Acts, a grant of those lands effected a

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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grant of the gold, silver, and precious metals therein and thereunder. The words "mines, minerals, and substances whatsoever," used in both Acts, are apt and precise words, in order to sever from the title of the Crown and to vest in the appellants the mines in question. As to the construction of the word "mine," see "The Gold Mining Ordinance, 1867," of British Columbia, Consolidated Acts, 1877, c. 123, s. 1; and as to "minerals," see the same Consolidated Acts, c. 126, s. 1. Compare the "Mineral Act" (1884, c. 10, s. 154), (Consolidated Acts, 1888, c. 82), as to both words. The precious metals being vested in the appellants, the respondent was not entitled to enter upon the land for the purpose of locating or working a placer claim either under the "Land Act, 1875" (Cons. Act, 1877, c. 98, s. 80), or the "Land Act, 1884," c. 16, s. 75 (Cons. Acts, c. 66, s. 95). Placer claims could not be lawfully located or recorded on the appellants' land having regard to the terms of their grant without their consent. The word "lands" in the "Placer Mining Act, 1891," s. 10, does not include lands in which the precious metals have been previously granted away by the Crown. Reference was made to *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1); Chitty on Prerogative, p. 294; *Woolley* v. *Attorney-General of Victoria* (2).

Bigham, Q.C., *Eberts*, *Q.C.* (Attorney-General of British Columbia), and *C. A. Russell*, for the respondent, contended that the words in the local Act, 47 Vict. c. 14, relied upon were not intended to vest the precious metals in the lands in suit in the appellant. They were not in themselves sufficiently precise for that purpose. The right of mining for them, therefore, remained in the provincial legislature; and the respondent, under the terms of the Placer Mining Act, 1891 (54 Vict. c. 26), having complied with the conditions contained in s. 11, was entitled to enter upon the lands for that purpose. The respondent's case rested solely on this, that the letters patent did not and were not authorized to make any reference to the precious metals, and that "mines, minerals, and substances whatsoever" could not be deemed to include them.

[1896] *A. C.* *p.* 563.

Cozens-Hardy, Q.C., replied.

1896. July 28. The judgment of their Lordships was delivered by

LORD WATSON. The respondent in this appeal is the holder of a free miner's certificate under the "British Columbia Placer Mining Act, 1891" (54 Vict. c. 26), authorizing him to work the "Blue Ruin" claim, 100 by 100 feet, which is situate within lands in Vancouver Island belonging to the appellant company.

(1) 14 App. Cas. 295, *ante*, p. 403. (2) 2 App. Cas. 163, 166.

The Act of 1891 by s. 10 gives the holder of such a certificate the right to mine for gold and other precious metals "upon any lands in the Province of British Columbia, whether vested in the Crown or otherwise, except upon Government reservations for town sites, land occupied by any building and any land falling within the curtilage of any dwelling-house, and any orchard and any land lawfully occupied for placer mining purposes, and also Indian reservations." By s. 11 the free miner is bound to give adequate security to the satisfaction of the Gold Commissioner for any loss or damage which may be caused by his entry, and to make full compensation to the occupant or owner of the lands for any loss or damage which may be caused by reason of his entry; such compensation, in case of dispute, to be determined by a Court having jurisdiction in mining disputes, with or without a jury.

The appellant company ejected the respondent from the land specified in his certificate, which he had entered upon for the purpose of gold mining; whereupon he brought the present suit against them before the Supreme Court of British Columbia, in which he concludes (1.) for damages, and (2.) for an injunction restraining them from interfering with his working, for gold and other precious metals, the "Blue Ruin" claim, as described in his certificate. The defence to the action is disclosed in an affidavit filed by James Dunsmuir, the president of the appellant company. Omitting details, the substance of the allegations made in defence is, that the company were, before the issue of the respondent's certificate, fully vested with the whole right and interest of the Crown to and in the mines of gold and other precious metals within the whole lands belonging to them in Vancouver Island, including the land embraced in the respondent's "Blue Ruin" claim.

[1896] *A. C.* p. 564.

Accordingly, the main if not the only question arising for decision is: Whether the appellant company have right to the mines of gold and other precious metals which may exist within their lands. Drake, J., before whom the case was tried, has found that they have not, and has ordered and adjudged that the respondent is entitled to enter upon and mine the lands belonging to them upon complying with the conditions contained in s. 11 of the Placer Mining Act of 1891. On appeal, his judgment has been unanimously affirmed by the Full Court, consisting of Crease, McCreight, and Walkem, JJ. The respondent does not maintain that his free miner's certificate would give him any right to enter and work if it were held that the gold and other precious metals in the lands of the appellant company are their property.

The circumstances under which the title of the appellant company

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to gold and other precious metals is asserted are as follows. By Order of Her Majesty in Council, dated May 16, 1871, the Province of British Columbia was admitted into the federal union of Canada, in terms of s. 146 of the British North America Act, 1867, subject to articles of union which had previously been agreed to by the Governments of the Dominion and the Province, and sanctioned by their respective legislatures. These articles included an undertaking by the Dominion to construct a line connecting the Canadian Pacific Railway with the sea-board of Vancouver Island; in consideration of which, the Government of British Columbia became bound to grant to the Dominion, (1.) a belt of land twenty miles in width, on either side of the new railway, across the mainland of the Province, and (2.) a large area of land in Vancouver Island, described by boundaries which it is unnecessary, for the purposes of this appeal, to refer to.

The railway has been made in terms of the undertaking given by the Dominion Government, who delegated its construction to the appellant company. The relative obligations of the Government of British Columbia were sanctioned, and given effect to, by the British Columbia Act, 47 Vict. c. 14. Sect. 2 of that Act granted to the Dominion Government the public lands along the line of railway to a width of twenty miles on each side of the line. Sect. 3 granted to the Dominion Government the area of land in Vancouver Island, already mentioned, "including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon, therein, and thereunder."

[1896] *A. C.* *p.* 565.

On August 20, 1883, an agreement was made between the promoters of the appellant company and the Government of the Dominion, to the effect that the company, when formed, should construct the line now known as the Esquimalt and Nanaimo Railway. After the incorporation of the company the agreement was sanctioned by the Dominion Act (47 Vict. c. 6), which also authorized the Governor in Council to grant to the company all the lands situated in Vancouver Island which had been granted to Her Majesty for behoof of the Dominion, by the Legislature of British Columbia, in aid of the construction of the railway, "and also all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever in, on, or under the lands so to be granted to the said company." In pursuance of that statutory authority, the Dominion Government, by deed under the Great Seal of Canada, dated April 21, 1884, granted and assigned to the appellant company, inter alia, all the lands and minerals in Vancouver Island which had been granted to that Government

by s. 3 of the British Columbia Act (47 Vict. c. 14). The extent of the appellant company's interest in these lands and minerals must therefore be determined by reference to the terms of that clause.

In *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1) it was held by this Board that s. 2 of the British Columbia Act, which relates to the lands comprised in the forty-mile belt, did not give the Dominion Government any right to gold and other precious metals in those lands, which were held by the Crown under its prerogative title. The 2nd section, which alone was considered in that case, makes no mention of, and does not profess to grant any subject, other than "public lands." The appellant company, whilst admitting that apt and precise language is necessary in order to alienate the prerogative rights of the Crown, rely upon the enumeration of minerals which is coupled with the grant of lands in s. 3 as sufficient to shew the intention of the Provincial Legislature to transfer to the Dominion Government their right to administer the precious metals in these lands.

[1896] *A. C.* p. 566.

The words relied on are, "including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon, therein, and thereunder." The only expressions occurring in that enumeration which can possibly aid the argument of the appellant company are "mines, minerals, and substances." Not one of these expressions can be rightly described as precise, or, in other words, as necessarily including the precious metals. According to the usual rule observed in the construction of the concluding and general items of a detailed enumeration, they may be held to signify alia similia with the minerals or substances previously enumerated; and it appears to their Lordships to be sufficient for the decision of the present case that they may be aptly limited to minerals or substances which are incidents of the land, and pass with the freehold.

Being of the same opinion with the learned judges in both Courts below, in whose reasoning they concur, their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The respondent's costs of this appeal must be paid by the appellant company.

Solicitors for appellants: *Hepburn, Son & Cutcliffe.*
Solicitors for respondent: *Gard, Hall, & Rook.*

(1) 14 App. Cas. 295, *ante*, p. 413.

J. C.*
1895
July 26.
1896
July 28.

FIELDING *v.* THOMAS [1896], A. C. 600.

FIELDING AND OTHERS . . . . . DEFENDANTS;

AND

THOMAS . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Law of Nova Scotia—Jurisdiction of Provincial House of Assembly—Immunities of its Members—Order of Imprisonment—Revised Statutes, 5th Series, c. 3.

The Nova Scotia House of Assembly has statutory power to adjudicate that wilful disobedience to its order to attend in reference to a libel reflecting on its members is a breach of privilege and contempt, and to punish that breach by imprisonment.

In an action for assault and imprisonment against members of the Assembly who had voted for the plaintiff's imprisonment:—

Held, that the sections of the local Revised Statutes, 5th Series, c. 3, which create the jurisdiction of the House and indemnify its members against legal proceedings in respect of their votes therein, are a complete answer to an attempt to enforce civil liability for acts done and words spoken in the House. Those sections, except so far as they may be deemed to confer any criminal jurisdiction, otherwise than as incident to the protection of members, are intra vires of the local legislature, as relating to the constitution of the province within the meaning of s. 92 of the British North America Act, 1867, or under the authority of s. 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63), which was recognised by the Act of 1867, s. 88.

Barton v. *Taylor* (11 App. Cas. 197) distinguished.

Appeal from an order of the Supreme Court (Dec. 2, 1893) dismissing the appellants' application to set aside a judgment and verdict in favour of the respondent for $200 damages, and to enter judgment for the appellants.

The circumstances out of which litigation arose were these. The respondent was Mayor of Truro, in the Province of Nova Scotia. Lawrence, one of the appellants, was recorder of the town and a member of the House of Assembly. Lawrence's salary was increased by an Act of the local legislature (54 Vict. c. 119), whereupon the town council exhibited articles of complaint against him, charging him with misbehaviour in his office of recorder and as member of the legislature, and in particular with having promoted the increase of his own salary. The respondent afterwards signed and published a petition, annexing a copy of the

* *Present:* LORD HALSBURY, L.C., LORD HERSCHELL, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

articles, in which petition were certain statements reflecting upon the conduct of Lawrence, on whose motion a resolution was passed by the House that the respondent had by such publication been guilty of a breach of the privileges of the House, and should be summoned to attend at its Bar. The respondent contended that his acts complained of were done by him in good faith in his capacity of mayor, and were not libellous. He was ordered to withdraw and remain in attendance, and subsequently ordered to be called in and reprimanded. He refused to obey, and left the precincts of the House; whereupon he was by order of the House arrested by the serjeant-at-arms, brought to the Bar of the House, and directed by the House to be committed to the common gaol of Halifax for forty-eight hours, with a proviso that imprisonment should cease if any prorogation supervened. He was imprisoned, but shortly afterwards discharged on a writ of habeas corpus issued out of the Supreme Court.

[1896] *A. C.* *p.* 602.

Two days afterwards, on April 27, 1892, the respondent brought his action against the appellants, all of whom were present at and voted for the passing of the resolution which led to the imprisonment.

The defence rested upon Revised Statutes, 5th Series, c. 3, under which it was contended that the House of Assembly possessed the same privileges, immunities, and powers as were enjoyed by the House of Commons of Canada, and also of the United Kingdom; that by ss. 29, 30, and 33 the House was a Court of Record, with an inherent power to punish insults to or libels on its members during session, and that the appellants possessed the privileges of judges of a Court of Record; that by s. 26 they were exempt from any civil action or damages. Some of the appellants pleaded a special Act of indemnity relating to themselves passed on April 30, 1892, and entitled, "An Act to amend c. 3 of the Revised Statutes of the composition, powers, and privileges of the House."

At the trial the judge ruled that the action must be dismissed as against the appellants protected by the last-mentioned Act; but that as against the others the provisions of Revised Statutes, 5th Series, c. 3, under which they claimed to have proceeded, were not within the competency of the legislature.

On appeal, M'Donald, C.J., and Graham, E.J., agreed with the first Court that the provisions in question were ultra vires the local legislature, and that the indemnity clause (s. 26) did not apply. Ritchie, J., thought that the provisions were not ultra vires, and that the House was sitting as a Court of Record and acting within its jurisdiction, its members being protected accordingly. Weatherbe, J., thought that the statute should be construed as empowering the House to deal with matters of crime only as an incident of protecting

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[1896] *A. C.* *p.* 603.

members in their proceedings; that so construed it was not ultra vires, and was applicable to the proceedings in question. The Court being equally divided, the judgment appealed from was affirmed.

Cohen, Q.C., Longley (Attorney-General for Nova Scotia), and *Lewis Coward*, for the appellants, contended that the House of Assembly had power to commit for contempt committed in the face of the Assembly, and that the respondent had been guilty of such contempt. Reference was made to *Phillips* v. *Eyre* (1) and *Doyle* v. *Falconer* (2).

[THE LORD CHANCELLOR. Those are cases which illustrate the implied power of the Legislature. Here there is a special Act, and the real question is whether it is intra vires.]

But apart from the special statute, the House of Assembly has powers, inherent in it, necessary for carrying on its business as such, including the power of punishing for contempts committed in the face of the Assembly. With regard to the power of the Assembly, as defined by, or derived from, statute, reference was made to the Imperial Act 28 & 29 Vict. c. 63, s. 5, by which the right of representative colonial legislatures to make laws respecting their own constitution and powers was conferred upon them. The British North America Act, 1867, does not purport to take away such right as regards Canada and its provinces. By s. 1 of 38 & 39 Vict. c. 38, which was substituted for s. 18 of the Act of 1867, the English Parliament defined the powers of the Dominion House of Commons; whilst it nowhere in the Act of 1867 or later defines those of the Assembly of Nova Scotia. But the Dominion House of Commons was created by the Act of 1867; the Nova Scotia House of Assembly existed prior thereto. Before 1867 Nova Scotia was governed by a Lieutenant-Governor and Legislative Assembly, who derived their powers under s. 5 of 28 & 29 Vict. c. 63. By s. 88 of the Act of 1867, the Nova Scotia constitution was continued as it existed at the date of the Union. Its power, therefore, to enact the provisions of Revised Statutes, c. 3, ss. 20 to 40, inclusive (see especially ss. 20, 29, 30, 31, and 33), relied upon by the appellants for their defence in this case, are derived from 28 & 29 Vict. c. 63. Beyond that, the Act of 1867, s. 92—see especially sub-ss. 1, 13, and 15—must be construed as conferring on the provincial legislature the exclusive right to amend the constitution of the province, to make laws affecting civil rights in the province, and to impose punishment for violating any law of the province made in relation to any matter enumerated in s. 92. Sect. 91 must be read in conjunction with s. 92, and must

[1896] *A. C.* *p.* 601.

(1) L. R. 6 Q. B. 1. (2) L. R. 1 P. C. 328, 340.

not be construed so as to conflict with the fair meaning of s. 92. Reference was made to *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1); *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (2); and to *Citizens' Insurance Co.* v. *Parsons* (3). It was contended that ss. 20 to 40, both in their general result and in their particular provisions, are amendments of the constitution of the province within the meaning of s. 92. Further, s. 129 was referred to as preserving, and as intended according to its true construction to preserve, to the House of Assembly both the right to pass laws enabling it to commit for contempt and also its existing powers to commit for contempt and breach of its orders.

Edward Blake, Q.C. (of the Colonial Bar), and *Tyrrell Paine*, for the respondent, contended that the provisions of c. 3 of 5th series of Revised Statutes of Nova Scotia were ultra vires the local legislature. The appellants, they contended, could not rely on s. 20 of the Revised Statutes, 5th series, c. 3, because that section only covered cases not specifically provided for. The present case is specifically provided for —if regarded as libel, by s. 29, sub-s. 1; if regarded as contempt for disobedience to an order of the House, by s. 29, sub-s. 3. The respondent's case, however, with regard to both s. 20 and s. 29, is that they are ultra vires. They cannot be supported as being an exercise of the powers given by the Colonial Laws Validity Act, 1865, s. 5, for the definition of colonies given in that Act (s. 1) would not comprise the provinces united into the Dominion of Canada by the British North America Act, 1867. The legislative authority is different; the executive authority is different; the controlling power over legislation is different. Moreover, the effect of the British North America Act is to repeal the Colonial Laws Validity Act so far as the provinces are concerned. The provincial legislatures possess no powers of legislation either inherent in them or dating from a time anterior to the British North America Act: *Bank of Toronto* v. *Lambe* (4). In order to ascertain what the powers of a provincial legislature are you must refer to s. 92 of the British North America Act. The appellants rely upon sub-ss. 1, 13, and 15 of that section. Sub-s. 1 gives the power to amend the constitution. This, however, does not involve the capacity to take the extraordinary powers purported to be given by the Revised Statutes, 5th series, c. 3. The capacity to take such powers and the power to amend the constitution are different things, and the Imperial Legislature, when they have

[1896] *A. C.* *p.* 605.

(1) [1892] A. C. 437, 441, *ante*, p. 414.
(2) [1894] A. C. 189, 200, *ante*, p. 447.
(3) 7 App. Cas. 96, 107, *ante*, p. 267.
(4) 12 App. Cas. 575, at pp. 587, 588, *ante*, p. 378.

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intended to invest a colonial legislature with the capacity to take such powers, have used apt words for the purpose. See s. 18 of the British North America Act, s. 5 of the Colonial Laws Validity Act, and s. 35 of the Victoria Government Act, 18 & 19 Vict. c. 55. This last-mentioned Act shews conclusively that the power to amend the constitution does not include the capacity to assume such powers as are here claimed, for by s. 60 of the Act the power to amend the constitution is fettered by conditions to which the capacity of assuming such powers is not subject.

With regard to sub-s. 13 of s. 92, which gives the power to make laws in relation to property and civil rights, the powers taken are really an interference with the powers given to the Dominion Parliament. With reference to the criminal law authorized by s. 91, sub-s. 27, whether regarded from the point of view of libel or contempt, the effect of the 20th and 29th sections of the Revised Statutes, 5th series, c. 3, is to legislate as to criminal matters, and the legislation only incidentally relates to civil rights. For this purpose its real object and not its incidental effect must be regarded in order to determine whether it is within the competence of the provincial legislature. Sub-s. 15 of s. 92 has no operation unless the law is primarily in relation to some matter coming within that section. If it is, then no doubt such law may be enforced by fine, penalty, or imprisonment.

[1896] *A. C.* *p.* 606.

If the appellants rely upon s. 30 of the Revised Statutes, 5th series, c. 3, constituting each House of the legislature a Court of Record, that section is ultra vires both for the reasons given as to ss. 20 and 29 and because it in effect appoints the judges of the Court contrary to the provisions of s. 96 of the British North America Act.

There remains s. 26 of the Revised Statutes, 5th series, c. 3, which not only purports to take away the right of action against members, which it may be is legislation with regard to civil rights, but purports to alter the criminal law by giving the members immunity from prosecution. In fact, it makes any such action or prosecution a violation of the chapter, and, therefore, under s. 31 punishable as a crime. Such an interference with the liberty of the subject far transcends any powers possessed by the Imperial House of Commons, is in the highest degree tyrannical, and cannot be within the powers of the provincial legislature. If the appellants' contentions are correct, the provincial legislatures have far wider powers than those possessed by the Dominion Parliament, which by 38 & 39 Vict. c. 38, repealing s. 18 of the British North America Act, are limited to those possessed by the Imperial House of Commons at the time of the passing of any Dominion Act taking such powers.

Counsel for appellants were not heard in reply.

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July 28.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This is an appeal from an order of the Supreme Court of Nova Scotia dismissing the application of the appellants for an order that the verdict and judgment entered for the present respondent at the trial of the action before Townshend, J., might be set aside and judgment should be entered for the appellants. By the verdict and judgment in question the appellants were found to have unlawfully assaulted and imprisoned the respondent. The Supreme Court were equally divided. McDonald, C.J., and Graham, E.J., were in favour of confirming the judgment, whilst Ritchie, J., and Weatherbe, J., held that judgment should be entered for the appellants. The judgment of Townshend, J., therefore stood confirmed.

The respondent was summoned to attend at the Bar of the House of Assembly to answer a breach of the privileges of the House in having published a libel reflecting on a member or members of the House (in connection with their conduct as members of the House). He attended on two occasions, and on the second occasion was ordered to withdraw and remain in attendance during the debate which took place. On being called in by the serjeant-at-arms by order of the speaker he refused to obey the order and left the precincts of the House. [1896] *A. C.* *p.* 607.

It is not denied that the respondent intentionally disobeyed the order of the House. He was thereupon arrested by order of the House, and on being brought to the Bar was adjudged to have been guilty of a contempt of the House committed in the face of the House, and was committed to the common gaol of Halifax for forty-eight hours. Upon this he brought an action for assault and imprisonment, and it is from the judgment in that action that the present appeal is brought. The appellants are sought to be made liable by reason of their having voted as members of the House of Assembly for the imprisonment of the respondent.

The acts complained of were justified under ss. 20, 29, 30, 31 of c. 3 of the Revised Statutes of Nova Scotia, 5th series. The appellants also relied on the indemnity given to members of the House of Assembly by s. 26 of the same statute.

These sections are as follows:—

"20. In all matters and cases not specially provided for by this chapter, or by any other statute of this province, the legislative council of this province and the committees and members thereof respectively, shall at any time hold, enjoy and exercise such and

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the like privileges, immunities and powers as shall be for the time being held, enjoyed and exercised by the senate of the Dominion of Canada, and by the respective committees and members thereof, and the House of Assembly, and the committees and members thereof, respectively, shall, at any time, hold, enjoy and exercise such and the like privileges, immunities and powers as shall for the time being be held, enjoyed and exercised by the House of Commons of Canada, and by the respective committees and members thereof; and such privileges, immunities and powers, of both Houses, shall be deemed to be and shall be part of the general and public law of Nova Scotia, and it shall not be necessary to plead the same, but the same shall in all courts of justice in this province, and by and before all justices and others, be taken notice of judicially."

[1896] *A. C.* *p.* 608.

"26. No member of either House shall be liable to any civil action or prosecution, arrest, imprisonment or damages, by reason of any matter or thing brought by him by petition, bill, resolution, motion or otherwise, or said by him before such House; and the bringing of any such action or prosecution, the causing or effecting any such arrest or imprisonment and the awarding of any such damages, shall be deemed violations of this chapter."

"29. The following acts, matters and things are prohibited, and shall be deemed infringements of this chapter:—

"1. Insults to or assaults or libels upon members of either House during the session of the legislature."

The other provisions of the section are immaterial to the present purpose.

"30. Each House shall be a Court of Record, and shall have all the rights and privileges of a Court of Record for the purpose of summarily inquiring into and (after the lapse of twenty-four hours) punishing the acts, matters and things herein declared to be violations or infringements of this chapter; and for the purposes of this chapter each House is hereby declared to possess all such powers and jurisdiction as may be necessary for inquiring into, judging and pronouncing upon the commission or doing of any such acts, matters or things, and awarding and carrying into execution the punishment thereof provided for by this chapter, and amongst other things each House shall have power to make such rules as may be deemed necessary or proper for its procedure as such court as aforesaid.

"31. Every person who shall be guilty of an infringement or violation of this chapter shall be liable therefor (in addition to any other penalty or punishment to which he may by law be subject) to an imprisonment for such time during the session of the legislature

then being held, as may be determined by the House before whom such infringement or violation shall be inquired into. The nature of the offence shall be succinctly and clearly stated and set forth on the face of any warrant issued for a commitment under this section."

It should be mentioned that by an Act (Revised Statutes of Canada, 49 Vict. c. 11) the Dominion Parliament had already conferred on themselves the privileges, immunities, and powers of the House of Commons of the United Kingdom. [1896] *A. C.* *p.* 609.

If it was within the powers of the Nova Scotia Legislature to enact the provisions contained in s. 20, and the privileges of the Nova Scotia Legislature are the same as those of the House of Commons of the United Kingdom as they existed at the date of the passing of the British North America Act, 1867, there can be no doubt that the House of Assembly had complete power to adjudicate that the respondent had been guilty of a breach of privilege and contempt and to punish that breach by imprisonment. The contempt complained of was a wilful disobedience to a lawful order of the House to attend.

The authorities summed up in *Burdett* v. *Abbot* (1), and followed in the case of *The Sheriff of Middlesex* (2), establish beyond all possibility of controversy the right of the House of Commons of the United Kingdom to protect itself against insult and violence by its own process without appealing to the ordinary courts of law and without having its process interfered with by those courts.

The respondent, however, argues that the Act of the provincial legislature which undoubtedly creates the jurisdiction and further indemnified members of it against any proceedings for their conduct or votes in the House by the ordinary courts of law is ultra vires.

According to the decisions which have been given by this Board there is no doubt that the provincial legislature could not confer on itself the privileges of the House of Commons of the United Kingdom, or the power to punish the breach of those privileges by imprisonment or committal for contempt without express authority from the Imperial Legislature. By s. 1 of 38 & 39 Vict. c. 38, which was substituted for s. 18 of the British North America Act, 1867, it was enacted that the privileges, immunities and powers to be held, enjoyed and exercised by the Dominion House of Commons should be such as should be from time to time defined by the Act of Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, [1896] *A. C.* *p.* 610.

(1) 14 East, 1. (2) 11 Ad. & E. 273.

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immunities or powers should not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof. There is no similar enactment in the British North America Act, 1867, relating to the House of Assembly of Nova Scotia, and it was argued, therefore, that it was not the intention of the Imperial Parliament to confer such a power on that legislature. But it is to be observed that the House of Commons of Canada was a legislative body created for the first time by the British North America Act, and it may have been thought expedient to make express provision for the privileges, immunities and powers of the body so created which was not necessary in the case of the existing Legislature of Nova Scotia. By s. 88 the constitution of the Legislature of the Province of Nova Scotia was subject to the provisions of the Act to continue as it existed at the union until altered by authority of the Act. It was therefore an existing legislature subject only to the provisions of the Act. By s. 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63) it had at that time full power to make laws respecting its constitution, powers and procedure. It is difficult to see how this power was taken away from it, and the power seems sufficient for the purpose.

Their Lordships are, however, of opinion that the British North America Act itself confers the power (if it did not already exist) to pass Acts for defining the powers and privileges of the provincial legislature. By s. 92 of that Act the provincial legislatures may exclusively make laws in relation to matters coming within the classes of subjects enumerated (inter alia), the amendment from time to time of the constitution of the province, with but one exception, namely, as regards the office of Lieutenant-Governor.

It surely cannot be contended that the independence of the provincial legislatures from outside interference, its protection, and the protection of its members from insult while in the discharge of their duties, are not matters which may be classed as part of the constitution of the province, or that legislation on such matters would not be aptly and properly described as part of the constitutional law of the province.

[1896] A. C. p. 611.

It is further argued that the order which the respondent disobeyed was not a lawful order, or one which he was under any obligation to obey. The argument seems to be that the original cause of complaint was a libel; that though the particular breach of the Act complained of was the disobedience to the order of the House, yet as those orders were issued in reference to a certain petition presented to the House the contents of which were alleged

to be libellous and during the investigation of the question who was responsible for its presentation, and as it must be assumed that a libel is a matter beyond the jurisdiction of the House to be inquired into, inasmuch as libel is a criminal offence and the criminal law is one of the matters reserved for the exclusive jurisdiction of the Dominion Parliament, the whole matter was ultra vires, and both the members who voted and the officers who carried out the orders of the House are responsible to an ordinary action at law.

Their Lordships are unable to acquiesce in any such contention. It is true that the criminal law is one of the subjects reserved by the British North America Act for the Dominion Parliament; but that does not prevent an inquiry into and the punishment of an interference with the powers conferred upon the provincial legislatures by insult or violence. The legislature has none the less a right to prevent and punish obstruction to the business of legislation because the interference or obstruction is of a character which involves the commission of a criminal offence, or brings the offender within reach of the criminal law. Neither in the House of Commons of the United Kingdom nor the Nova Scotia Assembly could a breach of the privileges of either body be regarded as subjects ordinarily included within that department of state government which is known as the criminal law.

The effort to drag such questions before the ordinary courts when assaults or libels have been in question in the British Houses of Legislature have been invariably unsuccessful, and it may be observed that 1 Wm. & M., Sess. II., c. 2, s. 1, sub-s. 9, "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament," is declaratory and not enacting.

[1896] *J. C.* *p.* 612.

Their Lordships are, therefore, of opinion that s. 20 of the Provincial Act is not ultra vires and affords a defence to the action. It may be that ss. 30, 31 of the Provincial Act if construed literally and apart from their context would be ultra vires. Their Lordships are disposed to think that the House of Assembly could not constitute itself a Court of Record for the trial of criminal offences. But read in the light of the other sections of the Act, and having regard to the subject-matter with which the Legislature was dealing, their Lordships think that those sections were merely intended to give to the House the powers of a Court of Record for the purpose of dealing with breaches of privilege and contempt by way of committal. If they mean more than this, or if it be taken as a power to try or punish criminal offences otherwise than as incident to the protection of members in their proceedings, s. 30 could not be supported.

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It is to be observed that in the case of *Barton* v. *Taylor* (1), referred to by one of the learned judges below, is no authority in favour of the contention here. No statute was there relied upon, but the Legislative Assembly itself in that case had in pursuance of statutory powers adopted certain standing rules or orders for the orderly conduct of the business of the assembly. The trespasses complained of were adjudged by this Board not to be justifiable under the standing orders. It was then sought to justify the acts in question as being within a power incident to or inherent in a Colonial Legislative Assembly. This Board refused to adopt that contention, but their Lordships expressly added:—

"They think it proper to add that they cannot agree with the opinion which seems to have been expressed by the Court below, that the powers conferred upon the Legislative Assembly by the Constitution Act do not enable the Assembly 'to adopt from the Imperial Parliament, or to pass by its own authority, any standing order giving itself the power to punish an obstructing member, or remove him from the chamber, for any longer period than the sitting during which the obstruction occurred.' This, of course, could not be done by the Assembly alone without the assent of the Governor. But their Lordships are of opinion that it might be done with the Governor's assent; and that the express powers given by the Constitution Act are not limited by the principles of common law applicable to those inherent powers which must be implied (without express grant) from mere necessity, according to the maxim, Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest. Their Lordships' affirmance of the judgment appealed from is founded on the view, not that this could not have been done, but that it was not done, and that nothing appears on the record which can give the resolution suspending the respondent a larger operation than that which the Court below has ascribed to it."

[1896] *A. C.* *p.* 613.

But independently of these considerations the provisions of s. 26 of the Act of the provincial legislature would in their Lordships' opinion form a complete answer to the action even if the act complained of had been in itself actionable. Their Lordships are here dealing with a civil action, and they think it sufficient to say that the legislature could relieve members of the House from civil liability for acts done and words spoken in the House whether they could or could not do so from liability to a criminal prosecution.

No such question as that which arose in *Barton* v. *Taylor* (1) arises here. All these matters—the express enactment of the privileges of the House of Commons of the United Kingdom—

(1) 11 App. Cas. 197.

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the express power to deal with such acts by the Provincial Assembly—the express indemnity against any action at law for things done in the Provincial Parliament, are all explicitly given, and the only arguable question is that which their Lordships have dealt with, namely, whether it was within the power of the provincial legislature to make such laws.

For these reasons their Lordships will humbly recommend to Her Majesty that the judgment in this case should be reversed and judgment entered for the appellants here [the defendants below] with costs. The respondent must pay the costs of this appeal. [1896] *A. C.* p. 614.

Solicitors for appellants: *Hill, Son & Rickards.*
Solicitors for respondent: *Paines, Blyth & Huxtable.*

CANADA *v.* ONTARIO [1897] A. C. 199 (INDIAN ANNUITIES CASE)

J. C.* 1896 *Nov.* 11, 12; *Dec.* 9.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR ONTARIO . . RESPONDENT.

AND

ATTORNEY-GENERAL FOR QUEBEC . . APPELLANT;

AND

ATTORNEY-GENERAL FOR ONTARIO . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Indian Reserves—Liability to pay Annuities in respect thereof —British North America Act, 1867, *ss.* 109, 111, 112.

By treaties in 1850 the Governor of Canada, as representing the Crown and the provincial government, obtained the cession from the Ojibeway Indians of lands occupied as Indian reserves, the beneficial interest therein passing to the provincial government, together with the liability to pay to the Indians certain perpetual annuities:—

Held that, these lands being within the limits of the Province of Ontario, created by the British North America Act, 1867, the beneficial interest therein vested under s. 109 in that province.

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

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The perpetual annuities having been capitalised on the basis of the amounts specified in the treaties, the Dominion assumed liability in respect thereof under s. 111. Thereafter the amounts of these annuities were increased according to the treaties:

Held, that liability for these increased amounts was not so attached to the ceded lands and their proceeds as to form a charge thereon in the hands of the province, under s. 109. They must be paid by the Dominion with recourse to the provinces of Ontario and Quebec conjointly, under ss. 111 and 112; in the same manner as the original annuities.

These two appeals were heard together from a judgment of the Supreme Court (Dec. 9, 1895), reversing an award made in an arbitration for settlement of all questions relating or incident to the accounts between the Dominion and the provinces of Ontario and Quebec, and between the two provinces, pursuant to 54 & 55 Vict. c. 6 (Canada), 54 Vict. c. 2 (Ontario), and 54 Vict. c. 4 (Quebec).

The questions decided turn upon the construction of two Indian treaties in 1850, the effect of which is stated in the judgment of their Lordships, and of ss. 109, 111, and 112 of the British North America Act of 1867, which are as follows:—

"Sect. 109. All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate, or arise subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same."

"111. Canada shall be liable for the debts and liabilities of each province existing at the Union."

"112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the Province of Canada exceeds at the Union sixty-two millions five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon."

An award was made in 1870 under s. 142 of the Act the 13th section of which provided "that all the lands in either of the provinces of Ontario and Quebec surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late Province of Canada, shall be the absolute property of the province in which the lands are respectively situate, free from any further claim upon, or charge to the said province in which they are so situate, by the other of the said provinces."

Then came the arbitration under the three statutes of 1891 mentioned above, under which a claim was put forward by the

Dominion Government on behalf of the Ojibeway Indians, based on the treaties: (*a*) against the Province of Canada for $325,440·00 arrears of augmented annuities from 1851 to 1867; (*b*) against the Province of Ontario for $95,200·00, being unpaid arrears of augmented annuities from 1867 to 1873; (*c*) against the Province of Ontario for $389,106·80, being the amount of increased annuities actually paid by the Dominion Government to the Indians from 1874 to 1892.

No question arose in this appeal under (*a*), or in reference to the amounts of the annuities originally specified in the treaties. These latter were capitalised at the date of confederation and added to the debt of the old province which was assumed by the Dominion.

The claims (*b*) and (*c*) were based on this, that the Province of Ontario, having succeeded to the lands surrendered, was liable for such increased annuities and payments under the treaties and s. 109.

The Province of Quebec supported that view.

The Province of Ontario, on the contrary, contended [1897] *A. C.* *p.* 201.

(*a*) That the liability, if any, was of the Province of Canada, in respect of which Ontario, as a separate province, has no liability in any case, except, if at all, conjointly with Quebec.

(*b*) By s. 13 of the award of September 3, 1870, Ontario was expressly freed from any liability separately from Quebec.

(*c*) That no trust exists in respect of the said lands; that the Indian title was extinguished in order that the lands might be opened up for settlement, and that patents from the Crown might issue therefor to purchasers; and that the annuities or augmentations are not liens on the lands.

(*d*) That the Dominion, at the Union, or at or before the passing of the Act 36 Vict. c. 30, included, or is deemed to have included, the liability in the amount of the debt of the Province of Canada assumed by the Dominion, and of which Ontario and Quebec were thereby relieved.

The arbitrators on the question of liability, apart from the amount, awarded as follows:—

"6. That the ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the Union, of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the Province of Ontario, and that this burden has not been in any way affected or discharged." [1897] *A. C.* *p.* 202.

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"9. That as respects the increased annuities which have been paid by the Dominion to the Indians since the Union, any payments properly made are to be charged against the Province of Ontario in the Province of Ontario Account, as of the date of payment to the Indians, and so fall within and be affected by our previous ruling as to interest on that account."

The Province of Ontario appealed from the above findings, and a majority of the Supreme Court (Strong, C.J., Taschereau and Sedgewick, JJ.) allowed the appeal, Gwynne and King, JJ., holding that it should be dismissed.

Accordingly the award was varied by striking out the 9th paragraph, and by substituting for the 6th paragraph the following:—

"The ceded territory mentioned became the property of Ontario under British North America Act, 1867, s. 109, absolutely, and free from any trust, charge, or lien in respect of any of the annuities, as well those presently payable as those deferred and agreed to be paid in augmentation of the original annuities, upon the condition in the treaties mentioned."

From this judgment the Dominion of Canada and the Province of Quebec appealed.

Cohen, Q.C., and *Lochnis*, for the Dominion of Canada, contended that the award of the arbitrators should be restored and the judgment of the Supreme Court reversed. Upon the construction of the treaties they contended that the covenant to pay the increased annuities was in effect and by necessary implication a covenant to pay out of the lands surrendered, being in terms a covenant to pay should the surrendered lands produce such an amount as would enable the Government to pay without incurring loss. Assuming this to be the right construction of the covenant, it was contended that at the time of the confederation a trust existed in respect of the lands surrendered, and an interest of the Indians therein, within the meaning of s. 109 of the Act of 1867, when properly construed. That section is not so limited in its application as to include only a direct charge or lien upon or an interest in lands enforceable by legal process. It applies to a trust or interest created by the Crown to be recognised and carried out by the Crown. Accordingly, the lands having become vested in the Crown in right of Ontario, the trust and interest in favour of the Indians should be observed and carried out by that province. The province got the benefit of the increased value and profits of the land, and it was equitable that it should bear the burden of any increased annuities resulting from those increased profits under the terms

[1897] *A. C.* *p.* 203.

of the treaties. Reference was made to *Attorney-General of Ontario* v. *Mercer* (1); *St. Catherine's Milling and Lumber Co.* v. *Reg.* (2); *Kinloch* v. *Secretary of State for India in Council* (3); *Rustomjee* v. *Reg.* (4). With regard to the 13th clause of the earlier award of 1870, Ontario was not intended to be thereby freed from any liability to the Dominion for annuities to Indians in consideration of the lands surrendered. It merely meant that, as between the respective provinces, lands of this kind held by one province should be freed from claims of all other provinces. If it was intended to exclude a claim in respect of the Indians, or based upon a trust within s. 109, it was ultra vires the arbitrators.

Angers, Q.C., and *J. S. Hall, Q.C.*, for the Province of Quebec, contended to the same effect.

Blake, Q.C., *Haldane, Q.C.*, and *Irving, Q.C.*, for the respondent, the Province of Ontario, contended that the award had been rightly amended or reversed by the Supreme Court. According to the award, the liability for the increased annuities, so far as it had become by the happening of the prescribed event a present liability before the Union, was part of the debt of the late Province of Canada to be borne by Ontario and Quebec jointly. Then the award drew the distinction, that so far as that liability had not come into existence as a present liability before the Union, it was not a debt of the late Province of Canada, but a charge on the surrendered lands to which Ontario became liable as the beneficial owner thereof. Reference was made to s. 111 of the Act of 1867, and it was contended that the liability to pay augmentations of the annuities was included in the "debts and liabilities" for which the Dominion became answerable under that section. The award admits that principle as regards such of the liabilities as had matured into debts before the Union. But the rest of the liabilities were created before the Union, and it was immaterial at what particular date they matured into debts. No distinction under s. 111 can be drawn between the two sets of liabilities. Recourse for all such liabilities must be had by the Dominion against the two provinces jointly. Then, as regards a charge or trust affecting the lands, it was not the intention of the authorities who concluded the treaties of 1850 to create charges or trusts in favour of the Indians affecting the surrendered lands or their proceeds to answer the annuities. Nor does the language of the treaties bear out that contention. The intention was to create liability on the part of the Province of Canada, party to the treaties, to pay out of its general revenue. Even if there were a trust or interest established in the lands it

[18.97] *A. C.* *p.* 204.

(1) (1883) 8 App. Cas. 767, *ante*, p. 322.
(2) (1888) 14 App. Cas. 46, *ante*, p. 390.
(3) (1882) 7 App. Cas. 619.
(4) (1876) 2 Q. B. D. 69.

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would exist solely for the benefit of the Indians, and would not affect the liabilities either of the old Province of Canada and the Dominion or of the various governments as between themselves in the ultimate adjustment of their accounts. The Supreme Court, moreover, were right in holding that this question had already been decided in favour of Ontario by the award of 1870 under s. 142 of the Act of 1867.

Cohen, Q.C., replied.

The judgment of their Lordships was delivered by

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[1897] *A. C. p.* 205.

LORD WATSON. In the year 1850 the Ojibeway Indians inhabiting the Lake Huron District, and the Indians of the same tribe inhabiting the Lake Superior District, entered into separate treaties with the Governor of the Province of Canada, acting on behalf of Her Majesty and the Government of the Province, for the cession of certain tracts of land, which had until that time been occupied as Indian reserves. As consideration for these surrenders, a sum of money was immediately paid under each treaty; and a promise and agreement were given by the Governor, as representing the Crown and the provincial Government, to pay a perpetual annuity, in the one case of 600*l.*, and in the other of 400*l.* Both treaties contained the further promise and agreement that, in case the territory ceded should at any future period produce an amount which would enable the Government of the Province, without incurring loss, to increase these annuities, then and in that case the same should be increased from time to time, provided that the amount paid to each individual should not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty might be graciously pleased to order. Provision was also made for a proportional abatement of the annuities, in the event, which has not yet occurred, of the Indian population of either district becoming diminished in number below a specified limit.

The effect of these treaties was, that, whilst the title to the lands ceded continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds, passed to the Government of the Province, which also became liable to fulfil the promises and agreements made on its behalf, by making due payment to the Indians of the stipulated annuities, whether original or increased. In 1867, under the Act of Union, the Province of Canada ceased to exist, having been divided by that statute into two separate and independent provinces, Ontario and Quebec. Until the time when that division became operative, the Indian annuities payable under the treaties of 1850 were debts

or liabilities of the old province, either present, future or contingent.

There are four sections in the Act of 1867 (ss. 109, 111, 112 and 142) which relate to the incidence, after Union, of the debts and liabilities of the old province. Those clauses contain the whole provisions of the Act upon that subject; and it is upon their construction that the decision of this appeal must ultimately depend. They distribute these debts and liabilities into two classes, the one being payable in the first instance by the Dominion, with a right of indemnity against Ontario and Quebec, and the other being directly chargeable either to Ontario or to Quebec.

Sect. 111 enacts, in general terms, that the Dominion of Canada "shall be liable for the debts and liabilities of each province existing at the Union." Sect. 112 enacts that Ontario and Quebec conjointly shall be liable to the Dominion for the amount (if any) by which the debt of the Province of Canada exceeds at the Union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of 5 per cent. per annum thereon. Then, by s. 142, provision is made for the apportionment of the excess of these conjoint liabilities over the sum specified between Ontario and Quebec.

[1897] *A. C.* p. 206.

The enactments of s. 109 relate to the lands, mines, minerals, and royalties from which the territorial revenues of the old province were derived. It assigns to Ontario and Quebec, respectively, such of these sources of revenue as are locally situated within the limits of each of these new provinces, together with all proceeds thereof which at the date of Union had become due and payable to the Province of Canada. But it is made an express condition of the transfer that the property transferred shall be "subject to any trusts existing in respect thereof, and to any interest other than that of the province (i.e. of Canada) in the same."

The beneficial interest in the territories ceded by the Indians under the treaties of 1850 became vested, by virtue of s. 109, in the Province of Ontario. So far as appears, the perpetual annuities of 600*l.* and 400*l.* were duly paid by the old province; and it was matter of admission, in the course of the argument upon this appeal, that, some time after the Union, the value of these annuities was capitalised, and, with consent of all the parties interested, added to the debts and liabilities which were assumed by the Dominion under the provisions of s. 111. The Indians do not seem to have become aware of the full extent of the rights secured to them by treaty, until the year 1873, when they for the first time preferred against the Dominion a claim for an annual increase of their

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respective annuities from and after the date of the treaties, upon the ground that, during the whole period which followed, the proceeds of the surrendered lands had been so large as to enable the stipulated increase to be paid without involving loss. The Dominion Government, who maintained then, as they do now, that the Province of Ontario is directly liable to the Indians for any such increase, under the provisions of s. 109, intimated the claim to that province, when its Government admitted that the condition had been satisfied upon which the increased amounts became due and payable, but disputed liability, upon the ground that the claim was one which fell in the first instance upon the Dominion, with recourse against Ontario and Quebec jointly. It was ultimately arranged that the Government of the Dominion should from and after that date and in the meantime continue to pay these increased allowances as they became due to the Indians, until the question of liability was determined.

[1897] *A. C.* *p.* 207.

It appears that many questions have arisen from time to time since that arrangement was made with regard to the debts and liabilities of the Province of Canada at the time of the Union; and these had the effect of delaying the final adjustment of the account contemplated by s. 112, the object of which is to ascertain and fix the precise balance of which Ontario and Quebec are made conjointly liable to relieve the Dominion. With the view of accelerating that adjustment, three statutes, in terms identical, were in the years 1890 and 1891 passed by the respective Legislatures of Canada, of Ontario, and of Quebec, sanctioning the appointment of three judges as arbitrators for the purpose of finally determining various matters which are therein specified—including all questions which had arisen or might thereafter arise "in the settlement of the accounts between the Dominion of Canada and the provinces of Ontario and Quebec," concerning which no agreement had previously been arrived at.

In terms of, and under the authority of, these statutes a deed of submission was entered into between the Governments of Canada, Ontario, and Quebec, and arbitrators were duly appointed. The Dominion submitted to them a claim against Ontario, (1.) for the increase of Indian annuities (which had not been paid) from the date of Union until 1874, and (2.) for the increased amounts which had been paid to the Indians between 1874 and 1892, with interest from the several dates of disbursement. The claim was urged, mainly upon the ground that the treaty stipulations giving the Indians a right to an increase of annuity either constituted a trust burdening the surrendered lands and their proceeds, within the meaning of s. 109, or created an interest in the same, other

[1897] *A. C.* *p.* 208.

than that of the old province, within the meaning of the same section. Quebec, having an obvious interest in the success of the claim, which would exclude any demand against its revenues under s. 112, maintained before the arbitrators the same view which was put forward by the Dominion.

The learned arbitrators, in February, 1895, issued an award, by the 6th article of which they found "that the ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the Union, of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the Province of Ontario; and that this burden has not been in any way affected or discharged." By a clause in the statutes of 1890 and 1891 it is enacted that when the arbitrators proceed on their view of a disputed question of law, the award shall set forth the same at the instance of either party, "and the award shall be subject to appeal so far as it relates to such decision to the Supreme Court, and thence to the Privy Council of England, in case their Lordships are pleased to entertain the appeal." The concluding part of that enactment ignores the constitutional rule that an appeal lies to Her Majesty, and not to this Board; and that no such jurisdiction can be conferred upon their Lordships, who are merely the advisers of the Queen, by any legislation either of the Dominion or of the provinces of Canada. By another clause in these Acts it is provided that, in case of an appeal on a question of law being successful, the matter shall go back to the arbitrators, for making such changes on the award as may be necessary, or an Appellate Court may make any other direction as to the necessary changes.

[1897] *A. C. p.* 209.

The learned arbitrators, by a supplementary order dated March 26, 1895, certified and declared that, in respect of the question as to the liability of the Province of Ontario for the increased annuities paid by the Dominion to the Indians since the Union, they proceeded upon their view of a disputed question of law. Their decision upon that point was accordingly brought under the review of the Supreme Court of Canada by an appeal at the instance of Ontario in which the Dominion and Quebec appeared as respondents. The Supreme Court was divided in opinion. Two of the learned judges, Gwynne and King, JJ., held that the award ought to be maintained and the appeal dismissed; but the majority, consisting of Strong, C.J., with Taschereau and Sedgewick, JJ., ordered and

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adjudged that "the award should be varied by substituting for paragraph 6 thereof the following:—

"The ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, absolutely and free from any trust, charge or lien in respect of any of the annuities, as well those presently payable as those deferred and agreed to be paid in augmentation of the original annuities upon the condition in the treaties mentioned." The Supreme Court, by the same majority, ordered the award to be further varied by striking out paragraphs 7 and 9; and directed that the respondents should pay his costs to the appellant. Against that judgment, both the Dominion and Quebec have presented appeals which have been admitted by Her Majesty in Council.

The findings which have been substituted, by the order of the Supreme Court for those contained in the 6th paragraph of the award raise the only substantial question which has been presented for their Lordships' decision. The directions to delete paragraphs 7 and 9 of the award are amendments merely consequential upon the previous findings being sustained, and must stand or fall with these findings. In other words, the main and only question between the parties is, whether liability for the increased amount of the Indian annuities stipulated by the treaties of 1850 is so connected with or attached to the surrendered territory and its proceeds, in the sense of the concluding enactments of s. 109, as to follow the beneficial interest, and form a charge upon it in the hands of the province.

[1897] *A. C.* *p.* 210.

The enactments of s. 109, upon which the appellants rely, are to the effect that the beneficial interest in the property held by the Crown of which that section disposes shall belong to the province in which the property is situated, subject always "to any trusts existing in respect thereof, and to any interest other than that of the province in the same." The transfer of beneficial interest which the clause operates is not confined to lands, but extends to all proceeds thereof which had become due and payable to the old province before Union. There is nothing in the Record of these appeals to shew whether any, and, if so, what amount of proceeds were at the time of Union due and payable, and therefore came into the possession of the new Province of Ontario. The claim made by the Dominion, and sustained by the arbitrators, is therefore in substance, that the Indian annuities form a charge upon the lands, and their proceeds arising after Union, with which s. 109 does not deal, except in so far as they are implied or included in the word "lands."

The expressions "subject to any trusts existing in respect thereof," and "subject to any interest other than that of the province," appear

to their Lordships to be intended to refer to different classes of right. Their Lordships are not prepared to hold that the word "trust" was meant by the Legislature to be strictly limited to such proper trusts as a court of equity would undertake to administer; but, in their opinion, it must at least have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate or its proceeds, to make payment, out of one or other of these, of the debt due to the creditor to whom that duty ought to be fulfilled. On the other hand, "an interest other than that of the province in the same" appears to them to denote some right or interest in a third party, independent of and capable of being vindicated in competition with the beneficial interest of the old province. Their Lordships have been unable to discover any reasonable grounds for holding that, by the terms of the treaties, any independent interest of that kind was conferred upon the Indian communities; and, in the argument addressed to them for the appellants, the claim against Ontario was chiefly if not wholly based upon the provisions of s. 109 with respect to trusts.

[1897] *A. C.* p. 211.

Two of the learned arbitrators explained at some length the reasons by which they were influenced in arriving at the conclusion which they embodied in the 6th paragraph of their award. They start from the proposition that the treaties of 1850, being in the nature of international compacts, ought to be liberally construed. That rule when rightly applied, in circumstances which admit of its application, is useful and salutary, but it goes no farther than this, that the stipulations of an international treaty ought, when the language of the instrument permits, to be so interpreted as to promote the main objects of the treaty. Their Lordships venture to doubt whether the rule has any application to those parts, even of a proper international treaty, which contain the terms of an ordinary mercantile transaction, in which the respective stipulations of the contracting parties are expressed in language which is free from ambiguity. Starting from the proposition already stated, Mr. Chancellor Boyd arrives, upon equitable and benignant principles, at the conclusion that the treaties of 1850 contain "an implied obligation to pay the increased annuities out of the proceeds of the lands which passes with the lands as a burden to be borne by Ontario." Burbidge, J., by a similar process of reasoning, arrived at substantially the same result, which was concurred in by Sir Louis Napoleon Casault.

Their Lordships are of opinion that the language of the treaties in question does not warrant the conclusion that payment of the original annuities and of their augmentations was to be derived

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from different sources, as the learned arbitrators appear to have held. The promise and agreement upon which the obligation for their payment rests is, in both cases, expressed in precisely the same terms. Their Lordships entirely agree with the following observations made by King, J., one of the minority in the Supreme Court: "Practically it does not now, and it never did, make any difference to the Indians, whether they were declared to have an interest in the proceeds of the land or not. Their assurance would be equal in either case" Even at the present time, and in view of the change of circumstances introduced by the Act of 1867, their Lordships think it must still be matter of absolute indifference to the Indians whether they have to look for payment to the Dominion, to which the administration and control of their affairs is entrusted by s. 91 (24) of the Act of 1867, or to the Province of Ontario. But it is clear that, for the purposes of the present question, the construction of the treaties must be dealt with on the same footing as if it had arisen between the Indians and the old Province of Canada; and it must be kept in view that, whilst the Indians had no interest in making such a stipulation, an agreement by the province to make a particular debt a charge upon a particular portion of its annual revenues, or an agreement to hold such portion of its revenue in trust for the future payment of that debt, might have occasioned considerable inconvenience to the Government of the province. Why, in these circumstances, a liberal construction should be resorted to for the purpose of raising an equitable right in the Indians which is of no pecuniary advantage to them, and to which the province did not, according to the ordinary and natural construction of the instruments, consent, and cannot with any degree of probability be presumed to have consented, their Lordships are at a loss to understand. The so-called equity appears to have been conjured up for the doubtful purpose of construing the provisions of s. 109 with an amount of liberality which the ordinary canons of construction do not admit of.

[1897] *A. C.* *p.* 212.

It may not be out of place, in this connection, to refer to the general arrangements made by the Government of the Province of Canada for the application of part of its revenues in payment of annuities to the Indian tribes. Before 1850 there had been many cessions of reserved territory by its Indian occupants, in respect of which consideration was due by the province in the shape of annual payments. These annuities, then amounting to 6666*l.* currency, were by the Provincial Act, 9 Vict. c. 114, charged upon the Civil List of the province; and an annual sum of 39,245*l.* 16*s.* currency was granted to the Crown, which was at that time the administrator of Indians and Indian affairs, out of "the Consolidated Revenue Fund of this province," for the purpose of paying

[1897] *A. C.* *p.* 213.

these annuities, and other charges included in Sched. B. of the Act. And there is no evidence to shew that, during the existence of the Province of Canada, the annuities which became payable under the two treaties of 1850 were dealt with on any other footing, or paid out of any other fund than the general revenues of the province.

Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities. They will, accordingly, humbly advise Her Majesty that the judgment of the Supreme Court of Canada ought to be affirmed, and both appeals dismissed. Seeing that the substantial question involved in these appeals is that of contract liability for a pecuniary obligation, they are of opinion that the rule followed by them in some really international questions between Canadian Governments ought not to apply here. The appellants must, therefore, pay to the respondent his costs of these appeals.

Solicitors for both appellants: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for respondent: *Freshfields & Williams.*

BREWERS AND MALTSTERS *v.* ONTARIO [1897], A. C. 231 (BREWERS AND MALTSTERS' CASE)

J. C.* 1896 *Nov.* 17. 1897 *Feb.* 6.

BREWERS AND MALTSTERS' ASSOCIATION OF ONTARIO . . . . . } APPELLANTS:

AND

THE ATTORNEY-GENERAL FOR ONTARIO RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO.

British North America Act, 1867, *s.* 92, *sub-ss.* 2, 9—*Powers of Provincial Legislature—Brewers' Licences—Revised Statutes of Ontario, c.* 194, *s.* 51, *sub-s.* 2—*Direct Taxation.*

Held, that the Liquor Licence Act (Revised Statutes of Ontario, c. 194), s. 51, sub-s. 2, which requires every brewer and distiller to obtain a licence

* *Present:*—LORD HERSCHELL, LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

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thereunder to sell wholesale within the province, is intra vires of the provincial legislature—

(*a*) as being direct taxation within sub-s. 2, s. 92, of the British North America Act, 1867.

Bank of Toronto v. *Lambe*, (1887) 12 App. Cas. 575, followed.

(*b*) as comprised within the term "other licences" in sub-s. 9 of the same section.

Appeal from a decision of the Court of Appeal for Ontario (Jan. 14, 1896), upon the questions stated in their Lordships' judgment which were referred to that Court by the Lieutenant-Governor in Council under Ontario Act 53 Vict. c. 13.

Sect. 51 of the Liquor Licence Act (Revised Statutes of Ontario, c. 194), referred to in the first of the said questions, is as follows:—

"51.—(1.) Sects. 49 and 50 shall not prevent any brewer, distiller, or other person duly licensed by the Government of Canada for the manufacture of fermented, spirituous, or other liquors, from keeping, having, or selling any liquor manufactured by him in any building wherein such manufacture is carried on, provided such building forms no part of and does not communicate by any entrance with any shop or premises wherein any article authorized to be manufactured under such licence is sold by retail, or wherein is kept any broken package of such articles.

"(2.) Every such brewer, distiller, or other person shall also first obtain a licence to sell by wholesale under this Act the liquor so manufactured by him, when sold for consumption within this province, under which licence the said liquor may be sold by sample, or in original packages, in any municipality as well as in that in which it is manufactured; but no such sales shall be in quantities less than those prescribed in sub-s. 4 of s. 2 of this Act."

Sub-sect. 4 of s. 2 is as follows:—

"(4.) 'Licence by wholesale,' or 'Wholesale licence,' shall mean a licence for selling, bartering, or trafficking, by wholesale only, in such liquors in warehouses, stores, shops, or places other than inns, ale, or beerhouses, or other houses of public entertainment, in quantities not less than five gallons in each cask or vessel at any one time; and in any case where such selling by wholesale is in respect of bottled ale, porter, beer, wine or other fermented or spirituous liquor, each such sale shall be in quantities not less than one dozen bottles, of at least three half-pints each, or two dozen bottles of at least three-fourths of one pint each, at any one time."

Sects. 49 and 50 of the said Liquor Licence Act are as follow:—

"49.—(1.) No person shall sell by wholesale or retail any spirituous, fermented, or other manufactured liquors without having

[1897] *A. C.* *p.* 232.

first obtained a licence under this Act authorizing him so to do; but this section shall not apply to sales under legal process or for distress, or sales by assignees in insolvency.

"(2.) No person, unless duly licensed, shall by any sign or notice hold himself out to the public as so licensed; and the use of any sign or notice for this purpose is hereby prohibited.

"50. No person shall keep or have in any house, building, shop, eating-house, saloon, or house of public entertainment, or in any room or place whatsoever, any spirituous, fermented, or other manufactured liquors for the purpose of selling, bartering, or trading therein, unless duly licensed thereto under the provisions of this Act; nor shall the occupant of any such shop, eating-house, saloon, or house of public entertainment, unless duly licensed, permit any liquors, whether sold by him or not, to be consumed upon the premises by any person other than members of his family or employees, or guests not being customers."

The Court (Hagarty, C.J., Burton, Osler, and Maclennan, JJ.) answered the first two questions in the affirmative, and the third in the negative. The judgment followed a previous decision of the same Court in *Reg.* v. *Halliday* (1).

E. Blake, Q.C., for the appellants, accepted the negative answer to the third question, but contended that the answers to the first two questions were erroneous. The licence referred to in the first question is not a licence for the regulation of trade, but purely for revenue purposes. It is issuable as of right to every brewer who applies, and on no conditions except the payment of a prescribed duty. So that the licensing system established is a mere machinery for laying on a duty or tax. It was contended that taxation of that kind was indirect, being, to cite language used in decisions of the Privy Council, "a duty which enters at once into the price of the taxed commodity," and also "a tax on a commodity which the brewer deals in, and can sell at an enhanced price to his customers": see *Bank of Toronto* v. *Lambe* (2); *Attorney-General for Quebec* v. *Queen Insurance Co.* (3); *Attorney-General for Quebec* v. *Reed* (4). Not being direct taxation, it is not within sub-s. 2 of s. 92 of the Act of 1867. The use of the machinery of licence does not validate it, for it does not come within sub-s. 9, not being of the same kind as the licences there mentioned. Besides, the Dominion Parliament has occupied the whole field of legislation on this subject, and in consequence has disabled the provincial legislature from interfering therewith. That [1897] A. C. p. 234.

(1) (1893) 21 Ont. App. Rep. 42.
(2) 12 App. Cas. 575, *ante*, p. 378.
(3) (1878) 3 App. Cas. 1090, *ante*, p. 222.
(4) (1884) 10 App. Cas. 141, *ante*, p. 360.

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Parliament has exclusive jurisdiction over the regulation of trade and commerce, the public debt, the raising of money by any mode of taxation. It has always regulated by statute the trade of manufacturing and wholesale vending of spirituous and fermented liquors. It has laid considerable duties thereon, created a rigorous system of inspection, supervision, management, and control of the business. It has provided for the issue of licences to manufacturers and vendors of the commodities authorizing them on certain conditions to make and sell. It is an interference with the powers of the Dominion for the province to step in and add to the conditions already prescribed by enacting that a provincial licence shall also be necessary. With regard to the second question, it was contended that the provincial legislature could not do so merely for the purpose of raising a revenue for provincial purposes. No object within provincial jurisdiction can be stated for which the legislature has power under these two sub-sections to require brewers and maltsters to take out such licences as are now in question and pay such tax. With reference to sub-s. 9, reference was made to *Severn* v. *Reg.* (1), and the authorities there cited.

Haldane, *Q.C.*, and *Cartwright*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

1897 *Feb.* 6.

[1897] *A. C. p.* 235.

LORD HERSCHELL. This is an appeal from a judgment of the Court of Appeal for the Province of Ontario upon certain questions referred by the Lieutenant-Governor in Council pursuant to the provisions of 53 Vict. c. 13.

The questions referred were the following:—

(1.) Is sub-s. 2 of s. 51 of the Liquor Licence Act (Revised Statutes of Ontario, c. 194), requiring every brewer, distiller, or other person duly licensed by the Government of Canada, as mentioned in sub-s. 1, to first obtain a licence under the Act to sell by wholesale the liquor manufactured by him, when sold for consumption within the province, a valid enactment?

(2.) Has the Legislature of Ontario power, either in order to raise a revenue for provincial purposes or for any other object within provincial jurisdiction, to require brewers, distillers, and other persons duly licensed by the Government of Canada for the manufacture and sale of fermented, spirituous, or other liquors, to take out licences to sell the liquors manufactured by them, and to pay a licence fee therefor?

(3.) If so, must one and the same fee be exacted from all such brewers, distillers, and persons?

(1) (1877) 2 Can. S. C. R. 70.

The present appeal relates only to the answers given to the first two questions submitted.

The enactment, the validity of which is in question, requires every brewer and distiller to obtain a licence to sell wholesale within the province. The licence fee is imposed "in order to the raising of a revenue for provincial purposes." It is a uniform fee of $100 in all cases.

The determination of the appeal depends on what is the true meaning and effect of the 2nd and 9th sub-sections of s. 92 of the British North America Act. The judgment appealed from can only be supported by establishing either that the fee imposed is "direct taxation" within the meaning of sub-s. 2, or that the licence is comprised within the term "other licences" in sub-s. 9.

The question what is "direct taxation" within the meaning of sub-s. 2 does not come now before this Board for consideration for the first time. In the case of the *Bank of Toronto* v. *Lambe* (1) it was necessary to put a construction on those words. The Legislature of Quebec had imposed a tax on every bank carrying on business within the province. This tax was a sum varying with the paid-up capital, with an additional sum for each office or place of business. The question at once arose, Was this "direct taxation"? It was contended that the tax was not direct but indirect. All the arguments in favour of the view that the taxation was indirect, which have been forcibly put before their Lordships by the learned counsel for the appellants in the present case, were then pressed upon this Board in vain. The legislation impeached was held valid on the ground that the tax imposed was direct taxation in the province within the meaning of sub-s. 2.

[1897] *A. C.* p. 236.

Their Lordships are quite unable to discover any substantial distinction between the case of *Bank of Toronto* v. *Lambe* (1) and the present case. So far as there is any difference it does not seem to them to be favourable to this appeal.

Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious indicia of direct and indirect taxation which were likely to have been present to the minds of those who passed the Federation Act.[2]

The definition referred to is in the following terms: "A direct

(1) 12 App. Cas. 575, *ante*, p. 385. (2) Disc. *Cotton* v. *The King*, *post*, p. 802.

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tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another such as the excise or customs."

In the present case, as in *Lambe's Case* (1), their Lordships think the tax is demanded from the very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in ordinary course take place or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee trifling in amount imposed alike upon all brewers and distillers without any relation to the quantity of goods which they sell. It cannot have been intended by the imposition of such a burden to tax the customer or consumer. It is of course possible that in individual instances the person on whom the tax is imposed may be able to shift the burden to some other shoulders. But this may happen in the case of every direct tax.

[1897] *A. C.* p. 237.

It was argued that the provincial legislature might, if the judgment of the Court below were upheld, impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer, and that they might thus seek to raise a revenue by indirect taxation in spite of the restriction of their powers to the imposition of direct taxation. Such a case is conceivable. But if the Legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise.

The view which their Lordships have expressed is sufficient to dispose of this appeal. But their Lordships were not satisfied by the argument of the learned counsel for the appellants that the licence which the enactment renders necessary is not a licence within the meaning of sub-s. 9 of s. 92. They do not doubt that general words may be restrained to things of the same kind as those particularised, but they are unable to see what is the genus which would include "shop, saloon, tavern" and "auctioneer" licences and which would exclude brewers' and distillers' licences.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitor for appellants: *S. V. Blake.*

Solicitors for respondent: *Freshfields & Williams.*

(1) 12 App. Cas. 575, *ante*, p. 378.

CANADA[1] *v.* ONTARIO [1898], A. C. 247 (QUEEN'S COUNSEL CASE)

J. C.* 1897 *July* 30; *Dec.* 8.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } Appellant;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO . . . . . } Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

British North America Act, 1867, s. 92, *sub-ss.* 1, 4, 14—*Powers of Provincial Legislature—Revised Statutes of Ontario*, 1877, c. 139—*Provincial Bar—Power to issue Patents of Precedence.*

Held that, according to the true construction of the British North America Act, 1867, s. 92, sub-ss. 1, 4, and 14, Revised Statutes of Ontario, 1877, c. 139, which empowers the Lieutenant-Governor of the province to confer precedence by patents upon such members of the bar of the province as he may think fit to select, is intra vires of the provincial legislature.

Appeal from a judgment of the Court of Appeal (Nov. 10, 1896) on a reference of certain questions in a case stated by the Lieutenant-Governor under Ontario Act 53 Vict. c. 13; which questions are as follows:—

(1.) Whether since March 29, 1873, it has been and is lawful for the Lieutenant-Governor of Ontario by letters patent in the name of Her Majesty under the Great Seal of Ontario,

(*a*) To appoint from among the members of the bar of Ontario such persons as he deems right to be during pleasure Her Majesty's Counsel for Ontario;

(*b*) To grant to any member or members of the bar of Ontario a patent or patents of precedence in the courts of Ontario.

(2.) Whether appointments of Queen's Counsel and grants of precedence such as are in the case stated to have been made by the Lieutenant-Governor of Ontario since the said date are and would be valid and effectual to confer on the holders thereof the office and precedence thereby purported to be granted.

(3.) Whether members of the bar of Ontario from time to [1898] *A. C. p.* 248.

* *Present*:—The Lord Chancellor, Lord Watson, Lord Macnaghten, Lord Morris, Lord Davey, Sir Henry de Villiers, and Sir Henry Strong.

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time appointed, or to be appointed, as aforesaid by the Lieutenant-Governor of Ontario by letters patent in Her Majesty's name under the Great Seal of Ontario to be Her Majesty's Counsel for Ontario, and members of the bar of Ontario to whom from time to time patents of precedence in the courts of Ontario have been or may be granted by the Lieutenant-Governor of Ontario, as aforesaid in conformity with the limitations of the revised Statute of Ontario, ch. 139, have or shall become entitled to such precedence in the courts of Ontario as have been or may be assigned to them by such letters patent after the several persons or classes referred to in the 3rd, 5th, and 7th sections of the said revised statute of Ontario.

(4.) Whether the position as to precedence in the courts of Ontario of the remaining members of the bar of Ontario not comprised within the classes referred to in the said 3rd, 5th, and 7th sections, and not holding patents issued by the Lieutenant-Governor of Ontario conferring on them the office of Queen's Counsel for Ontario, or granting to them precedence in the courts of Ontario, is as between them and those holding such patents as aforesaid subsequent to those holding such patents, and as between themselves in order of their call to the bar of Ontario.

(5.) In case the answer to any of the said questions be in the whole or in part negative, or in case an affirmative answer shall appear to the Court not to be a complete exposition of the matters involved, then what is the true state and condition of the matters involved in such questions.

The Court decided unanimously in favour of the provincial view, answering the first four questions in the affirmative. No answer to the fifth question was given except by Burton, J., who considered that the right to appoint Queen's Counsel in the provincial courts was vested exclusively in the Lieutenant-Governor of the province.

Hagarty, C.J., pointed out that the Judicial Committee of the Privy Council had decided that a Lieutenant-Governor was the representative of the Queen for all purposes of provincial government; he held that the Lieutenant-Governor had therefore, apart from provincial legislation, the right to appoint and to grant precedence, subject to regulation by the provincial legislature, under the 14th enumeration of s. 92 of the British North America Act of 1867; and also that the legislation was valid; and he decided that the four questions must be answered in the affirmative.

[1898] *A. C.* *p.* 249.

The other judges added that the matter came within sub-ss. 4, 13, and 14.

Haldane, *Q.C.*, *Mactavish*, *Q.C.*, and *F. Russell*, for the appellant.

Blake, *Q.C.*, and *Irving*, *Q.C.*, for the respondent.

The case of *Lenoir* v. *Ritchie* (1) was cited.

The judgment of their Lordships was delivered by

LORD WATSON. On March 29, 1873, the legislature of the Province of Ontario passed two Acts, entitled respectively, "An Act respecting the appointment of Queen's Counsel," and "An Act to regulate the precedence of the bar of Ontario." These statutes were consolidated and their provisions re-enacted by c. 139 of the Revised Statutes of Ontario, passed on December 31, 1877. The Act of 1877 makes regulations for the qualification of barristers-at-law and their admission to practise at the bar in Her Majesty's Courts of Law and Equity in Ontario. It declares that it "was and is lawful for the Lieutenant-Governor, by letters patent under the Great Seal of the Province of Ontario, to appoint from among the members of the bar of Ontario such persons as he may deem right to be, during pleasure, provincial officers under the names of Her Majesty's Counsel learned in the law for the Province of Ontario." It also enacts that the Lieutenant-Governor, by letters patent under the Great Seal of Ontario, may grant to any member of the bar a patent of precedence in the Courts of Ontario. In virtue of the authority thus conferred upon him the Lieutenant-Governor has from time to time exercised the right of issuing letters patent in Her Majesty's name to members of the provincial bar.

By the Canadian Act, 38 Vict. c. 11, which established a Supreme Court and a Court of Exchequer for the Dominion, all persons who are barristers or advocates in any of the provinces were permitted to practise as barristers, advocates, or counsel in the Supreme Court; and the same enactment has been repeated in s. 16 of c. 135 of the Revised Statutes of Canada. The Governor-General of Canada has, on various occasions between May, 1879, and January, 1890, issued letters patent in Her Majesty's name, under the Great Seal of Canada, by which he appointed certain members of the provincial bar of Ontario to

[1898] *A. C.* *p.* 250.

(1) (1875) 3 Sup. Ct. Rep. 575.

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be Queen's Counsel; and on these occasions the letters patent did not specify any territory or court for which the appointment was made, or in which it was to receive effect. The Government of Ontario does not appear to have at any time disputed that it was within the exclusive competency of the Governor-General of Canada to appoint members of the bar to the rank of Queen's Counsel in the courts of the Dominion; but it has carefully refrained from making the concession that the Governor-General has any right to appoint Queen's Counsel for the province from the provincial bar. On the other hand, the Dominion Government has persistently maintained that the appointment of Queen's Counsel to represent Her Majesty, whether in the Canadian or in the Provincial courts, involves an exercise of the Royal prerogative which belongs to the Governor-General of the Dominion. The main reason put forward in this appeal by the Attorney-General for the Dominion is to the effect that "the Lieutenant-Governor of Ontario does not entirely represent the Crown in respect of the prerogative right of the Crown; and in particular does not represent the Crown in respect of the prerogative right or power of appointing Queen's Counsel for Ontario, or granting patents of precedence in the courts of Ontario."

In order to ascertain whether he was legally justified in issuing these patents, the Lieutenant-Governor, availing himself of the provisions of the Provincial Act, 53 Vict. c. 13, referred five separate questions to the Court of Appeal for Ontario for hearing and consideration. The Attorney-General for the Dominion, who is the Appellant to this Board, appeared and took part in the discussion; and, on November 10, 1896, the Court, consisting of Hagarty, C.J., with Burton, Maclennan and Street, JJ., answered four of the queries in the affirmative, with the effect of sustaining the legality of the action of the Lieutenant-Governor. No answer was made to the fifth query, which is framed upon the assumption of the other queries being answered in the negative.

[1898] *A. C.* *p.* 251.

In order to explain the issue raised by this appeal, it is sufficient to refer to the terms of the first query, which are as follows:—

"(1.) Whether since the 29th of March, 1873, it has been and is lawful for the Lieutenant-Governor of Ontario by letters patent under the Great Seal of Ontario,

"(*a*) To appoint from among the members of the bar of Ontario such persons as he deems right to be during pleasure Her Majesty's Counsel for Ontario;

"(*b*) To grant to any member or members of the bar of Ontario a patent or patents of precedence in the courts of Ontario."

The second and third queries relate to the validity of the rights conferred upon the patentees, and present the same questions in a different aspect. The fourth query relates to the question of precedence in the courts of Ontario between those members of the bar who are the holders of patents of precedence and those who are not. The points thus referred to the determination of the Court of Appeal do not directly raise any controversy in regard to the jurisdiction and power of the Governor-General of Canada; they are strictly limited to the rights of the Lieutenant-Governor of Ontario to appoint Queen's Counsel from the provincial bar whose functions are limited to the province, and to grant patents entitling the holder to take precedence at the bar of the provincial courts.

The appointment of counsel for the Crown, and the granting of precedence at the bar to certain of its members, are matters which do not appear to their Lordships to stand upon precisely the same footing. In England the first of these rights has always been matter of prerogative in this sense, that it has been personally exercised by the Sovereign with the advice of the Lord Chancellor, the appointment being made by letters patent under the sign-manual. In early times the appointment was accompanied with a fee or retainer of moderate amount, but that formality has long since fallen into abeyance. The terms of the patent have been limited to appointing the grantees to be of counsel for the Sovereign, subject to the condition that they are to take precedence inter se according to the priority of their appointment. Royal patents of precedence inter se were in use to be granted to serjeants-at-law who did not derive their position from the Crown (1). Beyond these limits the Sovereign has never in modern times professed to confer upon Crown Counsel, or other members of the bar, a right of precedence or pre-audience in the courts of England. These are matters which have been regulated in practice either by the discretion of the bench or by the courtesy of the profession. The effect of an appointment as Queen's Counsel is that the holder cannot appear in court as counsel for any party litigating with the Crown unless he has obtained a licence from Her Majesty.

[1898] *A. C.* *p.* 252.

The exact position occupied by a Queen's Counsel duly

(1) See note, 16 C. B. (N.S.) 1.

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appointed is a subject which might admit of a good deal of discussion. It is in the nature of an office under the Crown, although any duties which it entails are almost as unsubstantial as its emoluments; and it is also in the nature of an honour or dignity to this extent, that it is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred. But it does not necessarily follow that, as in the case of a proper honour or dignity, the elevation of a member of the bar to the rank of Queen's Counsel cannot be delegated by the Crown, and can only be affected by the direct personal act of the Sovereign. Even in the case of titles of honour, it does not appear to be doubtful that the Sovereign may, with the assistance of an Act of the Legislature, exercise the prerogative in a manner which would but for its provisions be unconstitutional. It was adjudged by the House of Lords in the case of the Wensleydale Peerage that it was beyond the constitutional right of the Monarch to confer upon a life peer of any rank whom Her Majesty might choose to create the privilege of sitting and voting in Parliament. But life peerages carrying that privilege have since then been created by the Crown under the authority of and to the extent permitted by the Appellate Jurisdiction Act, 1876.

[1898] *A. C.* *p.* 253.

In the Province of Ontario the right of appointing Queen's Counsel has been committed to the Lieutenant-Governor by an Act passed by the provincial parliament with the sanction of the Crown. Assuming it to have been within the competency of the provincial legislature to vest that power in some authority other than the Sovereign, the Lieutenant-Governor appears to have been very properly selected as its depositary, seeing that, by s. 65 of the British North America Act, he is entrusted with the whole executive powers, authorities, and functions which before the Union had been vested in or were exercisable by the Governor or Lieutenant-Governor of the Province of Canada, in so far as these powers, authorities, and functions may be necessary for the government and administration of the new Province of Ontario.

The next and only other point requiring to be considered in this case is, whether the legislature of Ontario had jurisdiction to confer upon the Lieutenant-Governor those powers which are now embodied in the revised statute of December, 1877. That is a question which can only be solved by reference to the provisions of the Imperial Act of 1867; and there are three of the enactments of s. 92 which appear to their Lordships to

have an immediate bearing upon it. The first head of that clause gives to the legislature of each province exclusive authority to make laws from time to time for the amendment of the constitution of the province, "except as regards the office of Lieutenant-Governor." By sub-s. 4 of the same clause, "the establishment and tenure of provincial offices, and the payment of provincial officers." Again, by the 14th head, the legislature is empowered to make laws in relation to the administration of justice in the province, "including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts."

By the combined effect of these enactments it is entirely within the discretion of the provincial legislature to determine by what officers the Crown, or in other words the executive government of the province, shall be represented in its courts of law or elsewhere, and to define by Act of Parliament the duties, whether substantial or honorary, which are to be incumbent upon these officers, and the rights and privileges which they are to enjoy. The revised statute of 1877, in so far as it relates to the appointment of Queen's Counsel, is, in the opinion of their Lordships, within the limits of that legislative authority; and, that being so, there appears to them to be no ground for the suggestion that its provisions, when given effect to by the Lieutenant-Governor, will constitute an encroachment upon the prerogative of the Crown, or upon the rights of any representative of the Crown to whom, by the terms of his commission, the right of appointing counsel to represent the Sovereign may have been delegated. [1898] *A. C.* p. 251.

On the other hand, the enactments of s. 92, sub-s. 14, confer upon the provincial legislature in wide and general terms power to regulate the constitution and organization of all courts of law in the province, civil or criminal. It is no doubt true that with two exceptions, these being the Courts of Probate in Nova Scotia and New Brunswick, the appointment of the judges of the superior, district, and county courts in each province is committed to the Governor-General of Canada by s. 96, subject to the condition that, until the laws of the provinces are made uniform, these judges must be selected from the bar of the province in which the appointment is made. And, by s. 100, the right to fix the salaries, allowances, and pensions of these judges, except in the case of the Courts of Probate in Nova Scotia and New Brunswick, is vested in the Parliament of Canada, upon which there is also imposed the duty of providing the salaries, allowances, and pensions so fixed.

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But in all other respects the courts of each province, including the judges and the officials of the court, together with those persons who practise before them, are subject to the jurisdiction and control of the provincial legislature; that legislature and no other has the right to prescribe rules for the qualifications and admission of practitioners, whether they be pleaders or solicitors. Their Lordships, in these circumstances, do not entertain any doubt that the Parliament of Ontario had ample authority to give the Lieutenant-Governor power to confer precedence by patent upon such members of the bar of the province as he may think fit to select.

For these reasons their Lordships will humbly advise Her Majesty to affirm the decision appealed from. Following the rule which has been hitherto adopted in similar cases, they will make no order as to costs.

Solicitors for appellant: *Day, Russell & Co.*
Solicitor for respondent: *S. V. Blake.*

J. C.* 1897 *July* 28, 29, 30. 1898 *May* 26.

CANADA *v.* ONTARIO (FISHERIES CASE) [1898], A. C. 700

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } APPELLANT;

AND

ATTORNEYS-GENERAL FOR THE PROVINCES OF ONTARIO, QUEBEC, AND NOVA SCOTIA } RESPONDENTS.

ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO . . . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENT.

ATTORNEYS-GENERAL FOR THE PROVINCES OF QUEBEC AND NOVA SCOTIA . . } APPELLANTS;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *ss.* 91, 92, 108—*Distribution of Legislative Power — Construction — Rivers and Lake Improvements — "Public Harbours" — Fisheries and Fishing Rights—Revised Statutes of Canada, c.* 92, *c.* 95, *s.* 4—*Revised Statutes of Ontario, c.* 24, *s.* 47—*Ontario Act of* 1892 (55 *Vict. c.* 10).

Whatever proprietary rights vested in the provinces at the date of British North America Act, 1867, remained so unless by its express enactments

* *Present:*—THE LORD CHANCELLOR, LORD HERSCHELL, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, LORD DAVEY, and SIR HENRY DE VILLIERS.

transferred to the Dominion. Such transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject-matter of those proprietary rights.

Held, that the transfer by s. 108 and the 5th clause of its schedule to the Dominion of "rivers and lake improvements" operates on its true construction in regard to the improvements only both of rivers and lakes, and not in regard to the entire rivers. Such construction does no violence to the language employed, and is reasonably and probably in accordance with the intention of the Legislature:—

Held, that the transfer of "public harbours" operates on whatever is properly comprised in that term having regard to the circumstances of each case, and is not limited merely to those portions on which public works had been executed.

With regard to fisheries and fishing rights:—

Held, (1.) that s. 91 did not convey to the Dominion any proprietary rights therein, although the legislative jurisdiction conferred by the section enables it to affect those rights to an unlimited extent, short of transferring them to others.

(2.) a tax by way of licence as a condition of the right to fish is within the powers conferred by sub-ss. 4 and 12.

(3.) the same power is conferred on the Provincial Parliament by s. 92.

(4.) Revised Statutes of Canada, c. 95, s. 4, so far as it empowers the grant of exclusive fishing rights over provincial property, is ultra vires the Dominion.

(5.) Revised Statutes of Ontario, c. 24, s. 47, is with a specific exception intra vires the province.

As regards Ontario Act, 1892, the regulations therein which control the manner of fishing are ultra vires. Fishing regulations and restrictions are within the exclusive competence of the Dominion: see s. 91, sub-s. 12. *Secus* with regard to any provisions relating thereto which would properly fall under the headings "Property and Civil Rights" or "The Management and Sale of Public Lands":—

Held, further, that the Dominion Legislature had power to pass Revised Statutes of Canada, c. 92, intituled "An Act respecting certain Works constructed in or over Navigable Waters."

Three appeals by the Dominion of Canada, by the Province of Ontario, and by the Provinces of Quebec and Nova Scotia from a judgment of the Supreme Court (Oct. 13, 1896), delivered upon seventeen questions referred to it by the Governor-General of Canada pursuant to Revised Statutes of Canada, c. 35, as amended by Canadian statute 54 & 55 Vict. c. 25.

The questions referred were as follows:—

(1.) Did the beds of all lakes, rivers, public harbours, and other waters, or any and which of them, situate within the territorial limits of the several provinces, and not granted before confederation, become under the British North America Act the property of the Dominion or the property of the province in which the same respectively are situate, and is there in that respect any and what distinction between the various

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classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, &c., and the other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, &c., and other rivers, or between waters directly and immediately connected with the sea-coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

(2.) Is the Act of the Dominion Parliament, Revised Statutes of Canada, c. 92, intituled "An Act respecting certain Works constructed in or over Navigable Waters," an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part?

(3.) If not, in case the bed and banks of a lake or navigable river belong to a province, and the province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse, or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

(4.) In case the bed of a public harbour or any portion of the bed of a public harbour at the time of confederation had not been granted by the Crown, has the province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

(5.) Had riparian proprietors before confederation an exclusive right of fishing in non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

(6.) Has the Dominion Parliament jurisdiction to authorize the giving by lease, licence, or otherwise to lessees, licensees or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

[1898 A. C. p. 703.

(7.) Has the Dominion Parliament exclusive jurisdiction to authorize the giving by lease, licence, or otherwise to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any, and which of them?

(8.) Has the Dominion Parliament such jurisdiction as regards

navigable or non-navigable waters, the beds and banks of which are assigned to the provinces respectively under the British North America Act, if any such are so assigned?

(9.) If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a Provincial Legislature jurisdiction for the purpose of provincial revenue or otherwise to require the Dominion lessee, licensee, or other grantee to take out a provincial licence also?

(10.) Had the Dominion Parliament jurisdiction to pass s. 4 of the Revised Statutes of Canada, c. 95, intituled "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, or any and which of such several sections, or any and what parts thereof respectively?

(11.) Had the Dominion Parliament jurisdiction to pass s. 4 of the Revised Statutes of Canada, c. 95, intituled, "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, so far as these respectively relate to fishing in waters, the beds of which do not belong to the Dominion, and are not Indian lands?

(12.) If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the provinces, and others, but (subject to such property and rights) providing in the interests of the owners and the public, for the regulation, protection, improvement, and preservation of fisheries, as for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers, and the like?

(13.) Had the Legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, c. 24, intituled "An Act respecting the Sale and Management of Public Lands"; and ss. 5 to 13, both inclusive, and ss. 19 to 21, both inclusive, of the Ontario Act of 1892, intituled "An Act for the Protection of the Provincial Fisheries," or any and which of such several sections, or any and what parts thereof respectively?

[1898] A. C. p. 704.

(14.) Had the Legislature of Quebec jurisdiction to enact ss. 1375 to 1378 inclusive of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

(15.) Has a province jurisdiction to legislate in regard to

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providing fishways in dams, slides, and other constructions, and otherwise to regulate and protect fisheries within the province, subject to and so far as may consist with any laws passed by the Dominion Parliament within its constitutional competence?

(16.) Has the Dominion Parliament power to declare what shall be deemed an interference with navigation and require its sanction to any work, or erection in or filling up of navigable waters?

(17.) Had riparian proprietors, before confederation, an exclusive right of fishing in navigable non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to him by the Crown?

The judges of the Supreme Court (Strong, C.J., Taschereau, Gwynne, King, and Girouard, JJ.) differed with respect to the answers to be given, and delivered separate written opinions.

The opinions of the majority of the judges were to the effect that the beds of all ungranted waters situate within the territorial limits of a province were the property of such province and not of the Dominion, with the exception only of public harbours, as to which the decision in *Holman* v. *Green* (1) was binding; that the Provincial Governments alone had power to grant leases and licences as to fishing in such waters; that the jurisdiction of the Dominion as to fisheries was limited to passing general laws which without derogating from the property in the beds of such waters or from the rights incident to the ownership thereof might provide in the interest of the owners and the public for the regulation, protection, improvement and preservation of fisheries, and that the Provincial Legislatures had jurisdiction to make regulations as to fisheries within their respective provinces so far as such regulations were not inconsistent with and were not superseded by Dominion legislation.

[1898] *A. C.* *p.* 705.

With reference to the statutes referred to in questions 2, 10, 11, 13, and 14, the majority of the judges were of opinion that the Revised Statutes of Canada, c. 92, "An Act respecting certain Works constructed in or over Navigable Waters," was intra vires, and that the Dominion Parliament had power to declare what should be deemed an interference with navigation and require its sanction to any work or erection in, or filling up of navigable waters, but that as regards the Revised Statutes of Canada, c. 95, "An Act respecting Fisheries and Fishing," s. 4, when enforced outside Dominion waters, and ss. 14 sub-s. 1, 21 sub-ss. 1, 2, 3, and 22 were ultra vires; that s. 47

(1) (1881) 6 Sup. Can. Rep. 707.

of the Revised Statutes of Ontario, c. 24, "An Act respecting the Sale and Management of Public Lands," ss. 5 to 13 and 19 to 21 of 55 Vict. c. 10, "An Act for the Protection of the Provincial Fisheries," and ss. 1375 to 1378 of the Revised Statutes of Quebec, were intra vires, provided that and so long as they did not conflict with Dominion legislation.

Robinson, Q.C., *Haldane*, Q.C., *Macfarish*, Q.C., and *Lochnis*, for the Dominion of Canada, contended that the beds of all waters referred to in question 1 are the property of the Dominion; and that the Dominion has exclusive jurisdiction to give by lease or licence the right of fishing in all non-navigable and navigable waters: that all the provisions of Revised Statutes of Canada, c. 95, are intra vires. They further contended that Revised Statutes of Ontario, c. 24, s. 47, Ontario Act of 1892, ss. 5–13 and 19–21, and Revised Statutes of Quebec, ss. 1375–1378, are ultra vires. In general they contended that all the questions should have been answered favourably to the jurisdiction claimed on behalf of the Dominion; and that the answers to questions 1, 6–8, 10, 11, 13–15 were, so far as they were adverse to the claim of the Dominion, wrong in law.

The reasons given were that the Dominion was, under the British North America Act, 1867, the exclusive legislative authority for trade and commerce, defence, navigation and shipping, and sea-coast and inland fisheries. The executive power of the Dominion was, in the absence of express enactment to the contrary, co-extensive with the legislative power. Accordingly, the Act of 1867 must be construed as vesting the beds of all waters not granted before confederation exclusively in the Crown in right of the Dominion. The common law as to the ownership of waters which, though non-tidal, are in fact navigable, is not applicable to the great lakes and rivers of Canada, or to waters separating two or more provinces of the Dominion, or separating the Dominion from foreign territory. Again, the rights of the Crown in all navigable waters are amongst the regalia or prerogative rights which are in the Dominion under sect. 102. Rivers, moreover, are specifically mentioned in Sched. III. to the Act of 1867, and consequently became the property of the Dominion under s. 108. As regards s. 109, there is excepted from the operation of that section the interest of the Dominion in so much of the regalia as is immediately connected with the subject of legislation exclu-

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sively assigned to the Dominion by s. 91. Legislative authority over property and civil rights so far as the same are connected with fisheries is in the Dominion by virtue of s. 91, sub-s. 12, and not in the provinces. The taxation of Dominion lessees and licensees by a province is ultra vires of provincial authority, and inconsistent with the powers of the Dominion to grant such leases and licences, and an interference with the power of the Dominion.

[Reference was made to *Reg.* v. *Robertson* (1); *Holman* v. *Green* (2); *L'Union Jacques de Montréal* v. *Bélisle* (3); *Bank of Toronto* v. *Lambe* (4).]

Blake, Q.C., *Irving, Q.C.*, and *J. M. Clark*, for the Province of Ontario, contended that so much of the answers as were adverse to Ontario were wrong in law; while the answers favourable to the province relating to the beds of waters, the waters over the beds, and the fish in such waters, should be affirmed.

[1898] *A. C. p.* 707.

It was contended that legislative jurisdiction and proprietary right are dealt with by the Act of 1867 on quite different principles. Their limits are not identical. Transfer to the Dominion of proprietary right in any subject cannot be inferred from the grant of legislative jurisdiction over that subject. It must be expressly given. The residue of proprietary rights not transferred to the Dominion by s. 108 and Sched. III. remain vested in the provinces subject to ss. 109 and 117. On the other hand, the residuum of legislative jurisdiction not comprised in ss. 91 and 92 is vested in the Dominion. Proprietary rights, therefore, conferred on the Dominion depend on the enumerations contained in Sched. III. Beds of lakes, rivers, public harbours, and other waters within the limits of Ontario were at the time of the union "lands" within s. 109, and "public property" within s. 117. It has always been held that such lands remain vested in the Crown in right of the province, and that there exists over such inland waters rights of navigation and fishing analogous to those which exist over British navigable waters. The waters over the beds, together with the fish therein, belong to the province to which the beds belong. The legislative jurisdiction of the Dominion over shipping and navigation and fisheries does not imply a transfer of proprietary right; nor does the implication of executive powers involved in legislative jurisdiction warrant the inference of such transfer. Rivers,

(1) (1882) 6 Sup. Court Can. 52.
(2) 6 Sup. Can. Rep. 707.
(3) (1874) L. R. 6 P. C. 31, 37, *ante*, p. 206.
(4) (1887) 12 App. Cas. 575, *ante*, p. 378.

again, are not made Dominion property under the enumeration of "rivers and lake improvements" in Sched. III. read with s. 108. The phrase means on its true construction the improvements on any lake or river. The Dominion has no jurisdiction to lease or license rights of fishing; it would be an interference with "property and civil rights" competent only to the province. Sect. 91, sub-s. 12, gives the right to legislate generally with regard to the regulation and conservation of fisheries—not to interfere with property and civil rights. Even if the Dominion could grant a lease or licence, the province has, for the purpose of provincial revenue, a right to impose on the lessee or licensee a provincial licence also. Revised Statutes of Canada, c. 95, so far as it extends beyond general regulation and infringes "property and civil rights," is ultra vires. With regard to the Ontario Act of 1892, it is competent to the province as owner to protect or secure the interests of the owner so long as it does not interfere with the fishery powers of the Dominion. The province has power to regulate and protect fisheries so far as is consistent with valid Dominion laws.

[1898] *A. C.* p. 708.

With regard to public harbours, any proprietary right of the Dominion must depend on the interpretation of that phrase as it stands in Sched. III. and s. 108. It was contended that only public harbours which were "public works and property of the province" were dealt with: see the words at the head of the schedule. This did not include the ownership of the beds of harbours further than the soil of so much of the harbour as had been the subject or site of the expenditure of public money by the province, and thus had become a provincial public work and property. With that exception, the ownership of the beds remained in the former in right of the province, subject to all public rights, as of navigation. Whatever legislative powers the Dominion may possess in reference to harbours, that does not involve transference of proprietary right. With regard to Revised Statutes of Canada, c. 92, so far as its provisions are within the heading "Navigation and Shipping," and limited to those of a general and regulative character, it would be intra vires; so far as they were in excess of such regulation, it is ultra vires. It cannot validly interfere with property and civil rights, or authorize local interference with the public right of navigation. As to Revised Statutes of Ontario, c. 24, s. 47, it was in effect a re-enactment of an Act of the late Province of Canada, 23 Vict. c. 2, s. 35, and its validity depends on provincial proprietary right.

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Longley (*Attorney-General for Nova Scotia*) and *Coward*, for the Province of Nova Scotia.

Cannon (*Assistant Attorney-General for Quebec*) and *Coward*, for the Province of Quebec.

Robinson, Q.C., replied, and *Blake, Q.C.*, in the cross-appeal.

1898. May 26. The judgment of their Lordships was delivered by

LORD HERSCHELL. The Governor-General of Canada by Order in Council referred to the Supreme Court of Canada for hearing and consideration various questions relating to the property, rights, and legislative jurisdiction of the Dominion of Canada and the provinces respectively in relation to rivers, lakes, harbours, fisheries, and other cognate subjects.

[1898] *A. C.* *p.* 700.

The Supreme Court having answered some of the questions submitted adversely to the Dominion and some adversely to the provinces, both parties have appealed.

Before approaching the particular questions submitted, their Lordships think it well to advert to certain general considerations which must be steadily kept in view, and which appear to have been lost sight of in some of the arguments presented to their Lordships.

It is unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown, or what public rights exist in respect of them. Whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the province in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except in so far as they may be modified by legislation, are precisely the same. The answer, therefore, to such questions as those adverted to would not assist in determining whether in any particular case the property is vested in the Dominion or in the province. It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by

[1898] *A. C.* *p.* 710.

the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada (1).

With these preliminary observations their Lordships proceed to consider the questions submitted to them. The first of these is whether the beds of all lakes, rivers, public harbours, and other waters, or any and which of them situate within the territorial limits of the several provinces, and not granted before confederation, became under the British North America Act the property of the Dominion.

It is necessary to deal with the several subject-matters referred to separately, though the answer as to each of them depends mainly on the construction of the 3rd schedule to the British North America Act. By the 108th section of that Act it is provided that the public works and property of each province enumerated in the schedule shall be the property of Canada. That schedule is headed "Provincial Public Works and Property to be the Property of Canada," and contains an enumeration of various subjects, numbered 1 to 10. The 5th of these is "rivers and lake improvements." The word "rivers" obviously applies to nothing which was not vested in the province. It is contended on behalf of the Dominion that under the words quoted the whole of the rivers so vested were transferred from the province to the Dominion. It is contended, on the other hand, that nothing more was transferred than the improvements of the provincial rivers, that is to say, only public works which had been effected, and not the entire beds of the rivers. If the words used had been "river and lake improvements," or if the word "lake" had been in the plural, "lakes," there could have been no doubt that the improvements only were transferred. Cogent arguments were adduced in support of each of the rival constructions. Upon the whole their Lordships, after careful consideration, have arrived at the conclusion that the Court below was right, and that the improvements only were transferred to the Dominion (2). There can be no doubt that the subjects comprised in the schedule are for the most part works or constructions which have resulted from the expenditure of public money, though there are exceptions. It is to be observed that rivers and lake improvements are coupled together as one item. If the intention had been to transfer the entire bed of the rivers and only artificial works on lakes, one would not have expected to find them thus coupled together.

[1898] A. C. p. 711.

(1) Aff. *Ontario Mining Company* v. *Seybold* *post*, p. 592.

(2) Ref. *Wyatt* v. *Quebec*, *post*, p. 699.

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Lake improvements might in that case more naturally have been found as a separate item or been coupled with canals. Moreover, it is impossible not to be impressed by the inconvenience which would arise if the entire rivers were transferred, and only the improvements of lakes. How would it be possible in that case to define the limits of the Dominion and provincial rights respectively? Rivers flow into and out of lakes; it would often be difficult to determine where the river ended and the lake began. Reasons were adduced why the rivers should have been vested in the Dominion; but every one of these reasons seems equally applicable to lakes. The construction of the words as applicable to the improvements of rivers only is not an impossible one. It does no violence to the language employed. Their Lordships feel justified, therefore, in putting upon the language used the construction which seems to them to be more probably in accordance with the intention of the Legislature.

With regard to public harbours their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the 3rd schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term "harbour" on which public works had been executed became vested in the Dominion, and that no part of the bed of the sea did so. Their Lordships are unable to adopt this view. The Supreme Court, in arriving at the same conclusion, founded their opinion on a previous decision in the same Court in the case of *Holman* v. *Green* (1), where it was held that the foreshore between high and low water-mark on the margin of the harbour became the property of the Dominion as part of the harbour.

Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description "public harbour." They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend, to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green* (1) that if more than the public works con-

[1898] *A. C.* p. 712.

(1) 6 Sup. Can. Rep. 707.

nected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water-mark, being also Crown property, likewise passed to the Dominion.

Their Lordships are of opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it (1).

Their Lordships pass now to the questions relating to fisheries and fishing rights.

Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, "Sea-Coast and Inland Fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights (2). An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature (2). The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is

[1898] *A. C.* *p.* 713.

(1) Fol. *British Columbia* v. *C.P.R.*, *post*, p. 629.

(2) Disc. *British Columbia* v. *Canada*, *post*, p. 785.

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always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected. If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by s. 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the British North America Act, been left to the provinces and not vested in it.

In addition, however, to the legislative power conferred by the 12th item of s. 91, the 4th item of that section confers upon the Parliament of Canada the power of raising money by any mode or system of taxation. Their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of licence as a condition of the right to fish.

It is true that, by virtue of s. 92, the Provincial Legislature may impose the obligation to obtain a licence in order to raise a revenue for provincial purposes; but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention.

Their Lordships are quite sensible of the possible inconveniences, to which attention was called in the course of the arguments, which might arise from the exercise of the right of imposing taxation in respect of the same subject-matter and within the same area by different authorities. They have no doubt, however, that these would be obviated in practice by the good sense of the legislatures concerned.

1898] A. C. p. 714.

It follows from what has been said that in so far as s. 4 of the Revised Statutes of Canada, c. 95, empowers the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion, but to the provinces, it was not within the jurisdiction of the Dominion Parliament to pass it. This was the only section of the Act which was impeached in the course of the argument; but the subsidiary provisions, in so far as they are intended to enforce a right which it was not competent for the Dominion to confer, would of course fall with the principal enactment.

Their Lordships think that the Legislature of Ontario had jurisdiction to enact the 47th section of the Revised Statutes of Ontario, c. 24, except in so far as it relates to land in the harbours and canals, if any of the latter be included in the

words "other navigable waters of Ontario." The reasons for this opinion have been already stated when dealing with the questions in whom the beds of harbours, rivers, and lakes were vested.

The sections of the Ontario Act of 1892, intituled, "An Act for the Protection of the Provincial Fisheries," which are in question, consist almost exclusively of provisions relating to the manner of fishing in provincial waters. Regulations controlling the manner of fishing are undoubtedly within the competence of the Dominion Parliament. The question is whether they can be the subject of provincial legislation also in so far as it is not inconsistent with the Dominion legislation.

By s. 91 of the British North America Act, the Parliament of the Dominion of Canada is empowered to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by that Act assigned exclusively to the legislatures of the provinces, "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section," it is declared that (notwithstanding anything in the Act) "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated." The 12th of them is "Sea-Coast and Inland Fisheries."

[1898] A. C. p. 715.

The earlier part of this section read in connection with the words beginning "and for greater certainty" appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in s. 91 is not within the legislative competence of the Provincial Legislatures under s. 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a Provincial Legislature is in their Lordships' opinion incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of s. 91, and in particular to the word "exclusively." It would authorize, for example, the

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enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act.

It is true that this Board held in the case of *Attorney-General of Canada* v. *Attorney-General of Ontario* (1) that a law passed by a Provincial Legislature which affected the assignments and property of insolvent persons was valid as falling within the heading "Property and Civil Rights," although it was of such a nature that it would be a suitable ancillary provision to a bankruptcy law. But the ground of this decision was that the law in question did not fall within the class "Bankruptcy and Insolvency" in the sense in which those words were used in s. 91.

[1898] *A. C. p.* 716.

For these reasons their Lordships feel constrained to hold that the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature, and is not within the legislative powers of Provincial Legislatures.

But whilst in their Lordships' opinion all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of Provincial Legislatures is incompetent merely because it may have relation to fisheries. For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it, would be properly treated as falling under the heading "Property and Civil Rights" within s. 92, and not as in the class "Fisheries" within the meaning of s. 91. So, too, the terms and conditions upon which the fisheries which are the property of the province may be granted, leased, or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion Parliament may be conferred therein, appear proper subjects for provincial legislation, either under class 5 of s. 92, "The Management and Sale of Public Lands" or under the class "Property and Civil Rights." Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not in their Lordships' opinion intended to be within the scope of the class "Fisheries" as that word is used in s. 92.

(1) [1894] A. C. 189, *ante*, p. 456.

The various provisions of the Ontario Act of 1892 were not minutely discussed before their Lordships, nor have they the information before them which would enable them to give a definite and certain answer as to every one of the sections in question. The views, however, which they have expressed and the dividing line they have indicated will, they apprehend, afford the means of determining upon the validity of any particular provision or the limits within which its operation may be upheld, for it is to be observed that s. 1 of the Act limits its operation to "fishing in waters and to waters over or in respect of which the Legislature of this province has authority to legislate for the purposes of this Act."

Sects. 1375, 1376, and the 1st sub-section of s. 1377 of the Revised Statutes of Quebec afford good illustrations of legislation such as their Lordships regard as within the functions of a Provincial Legislature. [1898] *A. C.* p. 717.

Their Lordships entertain no doubt that the Dominion Parliament had jurisdiction to pass the Act intituled, "An Act respecting certain Works constructed in or over Navigable Waters." It is in their opinion clearly legislation relating to "navigation."

Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and Provincial Legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors.

The parties will of course bear their own costs of these proceedings.

Solicitors for Dominion: *Day, Russell & Co.*
Solicitor for Ontario: *S. V. Blake.*
Solicitors for Quebec and Nova Scotia: *Hill, Son & Rickards.*

J. C. *
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March 7, 9,
24.

C.P.R. *v.* BONSECOURS [1899], A. C. 367.

CANADIAN PACIFIC RAILWAY COMPANY . DEFENDANTS;

AND

CORPORATION OF THE PARISH OF NOTRE DAME DE BONSECOURS . . . . . } PLAINTIFFS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, QUEBEC.

British North America Act, 1867, *s.* 91, *sub-s.* 29, *and s.* 92, *sub-s.* 10—*Municipal Code of Quebec — Powers of Provincial Legislature — Municipal Legislation affecting Dominion Railway.*

By the true construction of British North America Act, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair, and alteration of the appellant railway; and the provincial legislature has no power to regulate the structure of a ditch forming part of its authorized works:—

But *held*, that the provisions of the municipal code of Quebec, which prescribe the cleaning of the ditch and the removal of an obstruction which had caused inundation on neighbouring land, are intra vires of the provincial legislature.

Appeal by special leave from a decree of the Court of Queen's Bench (Dec. 23, 1897) affirming a decree of the Superior Court (May 29, 1897), which condemned the appellant company to pay a fine of $200 for failure to clean and put in good order a ditch along the right of way of the company.

The Superior Court, under the circumstances stated in the judgment of their Lordships, based its judgment on the ground that, notwithstanding the provisions of the British North America Act, the company was subject to the provincial civil and municipal law, for the business it transacted within the province, and as to the part of the railway within the province. It held that the articles of the municipal code sought to be enforced were within the powers of the provincial legislature in virtue of sub-ss. 8, 13, and 16 of s. 92 of the British North America Act, and were in no way incompatible with any federal legislation, and particularly with the Railway Act of Canada (51 Vict. c. 29), s. 90, sub-ss. (*g*), (*h*), (*l*) and (*q*), and s. 11, sub-ss. (*q*) and (*r*), and did not encroach at all on the authority of the Parliament of Canada. Also that, by the negligence of the

* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and LORD DAVEY.

company and its refusal to clean the said ditch and put it in good order, the penalty was incurred.

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The Court of Queen's Bench (Hall, J., dissenting) confirmed this decree on the ground that the Federal Railway Act excluded from its dispositions all legislation sanctioned before May 25, 1883, and the municipal code came into force in 1870, and consequently was not affected by the dispositions of the Railway Act.

Hall, J., held that s. 307 of the Railway Act referred only to the internal economy of railway companies coming under this section, and that even if a railway exclusively under the control of the Dominion Parliament is amenable to certain local and municipal police regulations, these could not extend to interference which would affect the physical condition of the railway, because they would be an encroachment upon the powers of the railway committee under s. 14 of the Federal Railway Act, which provides for the construction of means of drainage or streets through, along, across or under works or lands of the company.

Blake, Q.C., and *Tyrrell Paine*, contended that the decree of the Court of Queen's Bench should be reversed. The appellants and their railway were, in respect of the matters in question, within the exclusive legislative jurisdiction of the Dominion Parliament. No provincial legislature is competent to enforce or compel the performance of any act which affects the physical condition of their railway. Everything affecting the physical condition of the railway is for the Dominion Parliament. The ditch is part of the railway. A practical and safe remedy for the grievance complained of by the respondents had been provided by means of a reference to the railway committee under the provisions of the Dominion Railway Act: see s. 14, which provides that whenever after due notice of application therefor the railway committee decides that it is necessary in the interest of any municipality that means of drainage be provided, or streets laid along or across the track of a railway, it may direct the terms, &c., upon which such drainage or street may be made; and thereupon such municipality may construct the works necessary, but only under the supervision of such official as the committee may appoint, &c. Reference was also made to ss. 306 and 307 of this Act consolidating former legislation on this subject, and declaring the subjection of the railways there mentioned, including the appellants', to the legislative authority of the Dominion, and saving the authority of provincial legislation prior to May 25, 1883, so far as consistent with subsequent Dominion legislation. Inasmuch as the Dominion Parliament has provided what it deems to be adequate means for the settlement of

[1899] *A. C.* *p.* 369.

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[1899] *A. C. p.* 370.

this matter through the machinery of the railway committee, provincial legislation, even if otherwise applicable, ceased to have any validity. Upon this point reference was made to *Tennant* v. *Union Bank of Canada* (1); *Attorney-General* v. *Brewery Co.* (2); *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces* (3). The Dominion legislation relied on was Canadian Railway Act, 1888, c. 29, s. 11, sub-ss. (*q*) and (*r*); s. 14; s. 90, sub-ss. (*g*), (*h*), (*i*), (*j*), (*p*). It was contended that everything known as railway legislation exclusively belonged to the Dominion Parliament. Licences, taxation, rating, matters of police regulation, belonged to the province. But everything relating to the structure of the railway or its ditches or fences was part of railway legislation, however unimportant in detail.

Haldane, Q.C., and *Hohler*, for the respondents, contended that although the appellant railway was a Dominion railway, it was subject in regard to the matter in hand to provincial legislation. The matter in hand had nothing to do with the structure or operation of the railway, nor did it interfere in any way with the exclusive control of the Dominion Parliament over the appellants. The notice of the rural inspector complained of was founded on arts. 867, 870, 871, 875, and 878 of the municipal code of the Province of Quebec, which articles simply provide for the cleaning and putting in good order of municipal watercourses; and on arts. 21 and 22, which provide that every railway company is obliged to construct and maintain all watercourses on the properties possessed or occupied by it within the municipality. Such provisions cannot be called railway legislation in any sense of the word, and accordingly do not trench upon the exclusive jurisdiction of the Dominion. They relate in terms and in effect to the abatement of local nuisance, to the question of mutual civil obligations as between adjoining proprietors, and accordingly relate to property and civil rights in the province within the meaning of s. 92, sub-s. 13, of the Act of 1867. See also sub-s. 8 and 15. It was contended that the control of ditches draining several properties was essentially a municipal matter; that there was no incompatibility between the Railway Act and the municipal code. *Citizens' Insurance Company of Canada* v. *Parsons* (4) was referred to. The matter in hand is in one aspect of Dominion cognizance, and in another of provincial cognizance. The two jurisdictions overlap, but do not coincide.

Blake, Q.C., replied.

(1) [1894] A. C. 45, *ante*, p. 433.
(2) [1896] A. C. 348, *ante*, p. 481.
(3) [1898] A. C. 714, *ante*, p. 542.
(4) (1881) 7 A. C. 116, *ante*, p. 267.

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CANADIAN PACIFIC RAILWAY *v.* CORPORATION OF THE PARISH OF NOTRE DAME DE BONSECOURS.

1899 *March* 24.

The judgment of their Lordships was delivered by

LORD WATSON. Part of the railway of the appellant company runs through the parish of Notre Dame de Bonsecours, in the district of Ottawa and Province of Quebec; and the respondents are the municipal authority of the parish, under the provisions of the municipal code, of the Province of Quebec.

Sect. 92 of the British North America Act, 1867, assigns exclusively to the legislature of each province the power of making laws in relation to matters coming within the classes of subjects therein enumerated. The class of subjects enumerated in sub-s. 10 is:—

"Local works and undertakings other than such as are of the following classes:—

[1899] *A. C.* *p.* 371.

"(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province:

"(*b*) Lines of steamships between the province and any British or foreign country:

"(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces."

On the other hand, by s. 91, sub-s. 29, the exclusive legislative authority of the Parliament of Canada is extended to "such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislature of the provinces."

It is not matter of dispute that, by virtue of these enactments, the Parliament of Canada had and have the sole right of legislating with reference to the matter of the appellants' railway. As it passes through the parish of Notre Dame de Bonsecours, the railway runs along a piece of ground belonging to one Julien Gervais, from which it is separated by a hedge, which is the boundary of the railway, and the property of the appellant company. Inside the hedge, and between it and the railway track, there is a ditch which has given rise to the present litigation. It is the property of the appellant company, and is part of the railway works.

On June 3, 1896, the rural inspector of the parish served the appellant company with a notice, requiring them, within eight days from its date, "à voir à nettoyer, réparer et mettre en bon état le fossé sud de votre voie, à l'endroit ou elle traverse la terre portant le numéro huit des plan et livre de renvoi officiels de la dite municipalité, et appartenant à Julien Gervais." The appellant company

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did not comply with the notice, and the respondents, the corporation of the parish, brought an action against them in the Superior Court of the province, setting forth the terms of the notice, the failure of the appellant company to comply with it, and concluding that in respect of such failure they should be ordered to pay a sum of $200. The only defence set up by the company, to which they still adhere, was, that the regulation of matters to which the order of their inspector related, which the corporation were seeking to enforce by penalty, belonged to the Parliament of Canada, and not to the Parliament of the Province of Quebec.

In the Superior Court Melhiot, J., gave judgment for the municipal corporation on the ground that, notwithstanding the terms of the North British America Act, the ditch in question and the company as its owners were subject to the municipal code of the province. The case was then carried by appeal to the Court of Queen's Bench, when the judgment of the Court below was affirmed by a majority of four judges to one.

The British North America Act, whilst it gives the legislative control of the appellants' railway quâ railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, inter alia, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament. It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec.

[1899] *A. C.* *p.* 373.

Whether the appellant company ought or ought not to prevail in this appeal depends upon what was the character of the railway ditch in question, and the real nature of the operation which the company were required to perform by the notice of June 3, 1896, which is the basis of the present suit. Ten or twelve words of plain unvarnished statement would have been very useful, much more so than the elegant and fanciful language by which the parties have endeavoured to explain, with the result of obscuring the facts. As to the structure of the ditch itself there is no information; but it does appear from the terms of the respondents' declaration that, from some cause or another, it had become obstructed, so that the water which it contained escaped and inundated the land of Julien Gervais. The company were required by the respondents' inspector, "nettoyer, réparer et mettre en bon état le fossé." Their Lordships read these words as simply amounting to a requisition that the company should clean the ditch by removing the obstruction, and should restore the ditch to the same state in which it was before the obstruction occurred. They do not think that the verb "réparer" suggests that any structural alteration of the ditch was contemplated. The appellant company have persistently maintained that the work directed to be done by the notice would, if carried out, "have the result of affecting the physical condition of the railway, though it is not alleged that such condition would be thereby injuriously affected." These expressions look formidable, but they really mean no more than this: that the removal of the obstruction would affect the physical condition of the ditch, and that the ditch is part of the railway. (1)

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from. The appellant company must pay to the respondents their costs of the appeal.

Solicitor for appellants: *S. V. Blake.*

Solicitors for respondents: *Simpson & Co.*

(1) Dist. *Maddin* v. *Nelson and Fort Sheppard*, *post*, p. 573. Expl. *British Columbia* v. *C.P.R.*, *post*, p. 630.

J. C.*
1899
July 7,
11, 28.

UNION COLLIERY *v.* BRYDEN [1899], A. C. 580.

UNION COLLIERY COMPANY OF BRITISH COLUMBIA, LIMITED, AND OTHERS . . } DEFENDANTS;

AND

BRYDEN . . . . . PLAINTIFF.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . . } INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Law of Canada—Legislative Power—British North America Act, 1867, *s.* 91, *sub-s.* 25, *and s.* 92, *sub-ss.* 10, 13—*British Columbia "Coal Mines Regulation Act*, 1890," *s.* 4—*Naturalization and Aliens—Chinamen.*

Held, that s. 4 of the British Columbian "Coal Mines Regulation Act, 1890," which prohibits Chinamen of full age from employment in underground coal workings, is in that respect ultra vires of the provincial legislature.

Regarded merely as a coal-working regulation, it would come within s. 92, sub-s. 10, or s. 92, sub-s. 13, of the British North America Act. But its exclusive application to Chinamen who are aliens or naturalized subjects establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament conferred by s. 91, sub-s. 25, in regard to "naturalization and aliens."

Appeal from a decree of the Full Court (July 13, 1898) dismissing an appeal from a decree of Drake, J. (May 14, 1898).

The question decided in this appeal was whether or not s. 4 (set out in their Lordships' judgment) of the local Coal Mines Regulation Act, 1890, now s. 4 of the Revised Statute No. 138 of 1897, was intra vires of the provincial legislature. The Courts below upheld its validity, and granted the injunction prayed for against the appellants.

Blake, Q.C., and *Cassidy*, for the appellants, contended that the enactment in question was not within the competence of the provincial legislature. It dealt with the subject of "aliens" within the meaning of British North America Act, 1867, s. 91, sub-s. 25. It disabled Chinamen for the exercise of the ordinary right, preserved to all others, to earn their bread by their labour, for no other reason than that of their origin. By s. 91, sub-s. 25, the Dominion Parliament has exclusive legislative authority over aliens; and by s. 132 it

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR RICHARD COUCH, and SIR EDWARD FRY.

has all powers necessary for performing the treaty obligations of Canada to foreign countries. By art. 1 of the treaty between Her Majesty and the Emperor of China, dated August 29, 1842, confirmed by the treaty of 1858, and art. 5 of the convention between the same Powers made on October 24, 1860, Chinamen have the right to take service in the Colonies, and regulations were to be made for their protection when emigrating. The British Columbia legislature has been endeavouring for years to prevent and restrict the settlement of Chinese aliens in the province in order to prevent competition with the whites. Several of such attempts have proved abortive, some because the Acts when passed were declared ultra vires, others because they were disallowed by the Canadian executive. Reference was made to the Chinese Tax Act, 1878, c. 35, which was held to be ultra vires; Acts of 1884, cc. 2, 3, 4; Acts of 1885, c. 13; of 1886, cc. 25, 26, 27, 29, 30, 31, 33, 35; Acts of 1890, c. 50; of 1891, cc. 48 and 69; of 1895, cc. 5, 59; Acts of 1896, cc. 38, 51, 56; of 1897, cc. 1 and 2; of 1898, cc. 4, 28, 46. The Dominion Parliament dealt with the subject of Chinese immigration by 48 & 49 Vict. c. 67, R. S. C. 1886, whereby it regulated the immigration of Chinese into Canada, imposed a tax or duty on every Chinese immigrant, and prohibited the organization of private tribunals by the Chinese. It was contended that the enactment in question violated the spirit of the treaties referred to, was opposed to the comity of nations, and was calculated to create complications between the British and Chinese Governments, and conflicted with the exclusive authority of the Dominion Parliament. Even if there be some aspect of the question of aliens in which aliens may be touched incidentally by the province, this is not such a case. The Dominion Parliament had dealt with the subject as completely as it saw fit, and it was not competent to the provincial legislature to impose further special restrictions and disabilities upon the Chinese alien immigrants into British Columbia. Reference was made to *Musgrove* v. *Chun Teeong Toy* (1).

[1899] *A. C.* p. 582.

Haldane, *Q.C.*, and *C. Russell*, *Q.C.*, for the intervenant, contended that the enactment in question was intra vires of the provincial legislative authority. The case had two aspects; one as relating to aliens, and the other as to restricting the employment generally in mines below ground of particular kinds of labour. As regards the former, that would be within the exclusive competence of Dominion legislation. But Chinamen are not necessarily aliens. The term Chinese or Chinamen is one which is perfectly well understood in Canadian legislation, and means persons of Chinese habits and origin. It may include aliens within its meaning; but most of the Chinese

(1) [1891] A. C. 272.

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who are affected by this legislation have been naturalized. Of the statutes cited on the other side as being in pari materiâ, three contain definitions of Chinese: (1.) the Act of 1898, c. 28, s. 4. [SIR E. FRY. The date of that is after the enactment in question.] (2.) Crown Lands Act, 1888, c. 66, s. 2: see Revised Statutes, 1897; (3.) Alien Labour Act, 1897, c. 2, s. 4. Assuming the case of alien Chinese, there is still the other aspect of the question. The restricting of employment generally in the manner enacted is a matter included in the class of subjects, "property and civil rights in the province," within the meaning of s. 92, sub-s. 13, of the Imperial Act of 1867. In that aspect it is within the exclusive competence of the provincial legislatures. Reference was made to *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (1); *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2).

Taylor, Q.C., for the other respondent.

Blake, Q.C., replied.

[1899] *A. C. p.* 583.

1899. July 28. The judgment of their Lordships was delivered by

LORD WATSON. The appellant company carries on the business of mining coal by means of underground mines, in lands belonging to the company, situated near to the town of Union in British Columbia. The company have hitherto employed, and still continue to employ, Chinamen in the working of these underground mines.

By s. 4 of the Coal Mines Regulation Act, 1890, it is expressly enacted that, "no boy under the age of twelve years, and no woman or girl of any age, *and no Chinaman*, shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground."

By the Act of 1890, the words "and no Chinaman" were added to the 4th section of the then existing Coal Mines Regulation Act, which was chapter 84 of the Consolidated Statutes of 1888, and now, as amended, is chapter 138 of the Revised Statutes of British Columbia, 1897. It is sufficiently plain, and it is not matter of dispute, that the provisions of the Act of 1890 were made to apply, and so far as competently enacted do apply, to the underground workings carried on by the appellant company.

The present action was instituted, in the Supreme Court of British Columbia, by the respondent, John Bryden, against the appellant company, of which he is a shareholder. It concludes (1.) for a declaration that the company had and has no right to employ Chinamen in certain positions of trust and responsibility, or as labourers in their mines below ground, and that such employment was and is

(1) [1894] A. C. 189, *ante*, p. 447. (2) [1896] A. C. 348, *ante*, p. 481.

unlawful, and (2.) for an injunction restraining the company from employing Chinamen in any such position of trust and responsibility, or as labourers below ground, and from using the funds of the company in paying the wages of the said Chinamen. The respondent averred in his statement of claim that the employment of Chinamen in positions of trust and responsibility, and as labourers underground, was a source of danger and injury to other persons working in the mines, which involved the liability of the company for damages, and was also injurious and destructive to the mines. He also pleaded that the employment of Chinamen in these capacities was contrary to the statute law of the province.

[1899] *A. C.* *p.* 584.

The appellant company, by their statement of defence, denied that there was any risk of injury arising either to other workmen in their mines, or to the mines, from the employment of Chinamen as underground miners. They pleaded that, in so far as they related to adult Chinamen, the enactments of s. 4 of the Coal Mines Regulation Act were void as being ultra vires of the legislature of the Province of British Columbia.

The case was tried in the Superior Court before Drake, J., without a jury. In the course of the trial the respondent, the Attorney-General for the Province of British Columbia, who appears to have suspected that this suit was collusive, appeared by counsel, and he has since, in the character of intervenant, been a party to the litigation. It appeared from the evidence that the appellant company, in working some of their underground seams of coal, employed no workmen except Chinamen who were of full age, and that, in those parts of their workings where miners other than Chinamen were employed, no Chinamen occupied a position of trust or responsibility, such as were alleged in the statement of claim. The consequence was that, in the subsequent conduct of the litigation, the Courts below, and their Lordships in this appeal, have only been invited to consider the conclusions of the action in so far as these bear upon the legality of employing Chinese labour in violation of the express enactments of s. 4 of the Revised Statute No. 138 of 1897. In other words, the controversy has been limited to the single question—whether the enactments of s. 4, in regard to which the appellant company has stated the plea of ultra vires, were within the competency of the British Columbian Legislature.

In considering the issue to which the case has thus been narrowed, the evidence led by the parties appears to their Lordships to be of no relevancy. It is chiefly directed to the character, whether reasonable or unreasonable, of the legislation which has been impugned by the appellant company. But the question raised directly concerns

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[1899] A. C. p. 585.

the legislative authority of the legislature of British Columbia, which depends upon the construction of ss. 91 and 92 of the British North America Act, 1867. These clauses distribute all subjects of legislation between the Parliament of the Dominion and the several legislatures of the provinces. In assigning legislative power to the one or the other of these parliaments, it is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction, the discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but, when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not. There are various considerations discussed in the judgments of the Courts below which, in the opinion of their Lordships, have as little relevancy to the question which they had to decide as the evidence upon which these considerations are founded.

There can be no doubt that, if s. 92 of the Act of 1867 had stood alone and had not been qualified by the provisions of the clause which precedes it, the provincial legislature of British Columbia would have had ample jurisdiction to enact s. 4 of the Coal Mines Regulation Act. The subject-matter of that enactment would clearly have been included in s. 92, sub-s. 10, which extends to provincial undertakings such as the coal mines of the appellant company. It would also have been included in s. 92, sub-s. 13, which embraces "Property and Civil Rights in the Province."

But s. 91, sub-s. 25, extends the exclusive legislative authority of the Parliament of Canada to "naturalization and aliens." Sect. 91 concludes with a proviso to the effect that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

[1899] A. C. p. 586.

Sect. 4 of the Provincial Act prohibits Chinamen who are of full age from employment in underground coal workings. Every alien when naturalized in Canada becomes, ipso facto, a Canadian subject of the Queen; and his children are not aliens, requiring to be naturalized, but are natural-born Canadians. It can hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada; but s. 91, sub-s. 25, might possibly be construed as conferring that power in the case of naturalized aliens after naturalization. The subject of "naturalization" seems primâ facie to include the power of enact-

ing what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term "naturalization" was intended to bear, as it occurs in s. 91, sub-s. 25. But it seems clear that the expression "aliens" occurring in that clause refers to, and at least includes, all aliens who have not yet been naturalized; and the words "no Chinaman," as they are used in s. 4 of the Provincial Act, were probably meant to denote, and they certainly include, every adult Chinaman who has not been naturalized.

Drake, J., before whom the case was tried, and on appeal the learned judges of the Full Court, were of opinion that the enactments of s. 4 of the Mines Regulation Act, so far as challenged, were within the legislative jurisdiction of the parliament of the province. They accordingly gave the plaintiff a declaration to the effect that the appellant company has no power to employ Chinamen, or to allow Chinamen to be, for the purpose of employment, in any mine of the company in British Columbia below ground, and that the employment by the company of Chinamen in their coal mines below ground at Union was unlawful, as being contrary to s. 4 of the Coal Mines Regulation Act. They also, in terms of that declaration, granted an injunction restraining the appellant company, its contractors, servants, workmen, and agents, from employing Chinamen, or allowing Chinamen to be for the purpose of employment, in the coal mines of the company at Union, contrary to the provisions of s. 4.

[1899] *A. C. p.* 587.

The provisions of which the validity has been thus affirmed by the Courts below are capable of being viewed in two different aspects, according to one of which they appear to fall within the subjects assigned to the provincial parliament by s. 92 of the British North America Act, 1867, whilst, according to the other, they clearly belong to the class of subjects exclusively assigned to the legislature of the Dominion by s. 91, sub-s. 25. They may be regarded as merely establishing a regulation applicable to the working of underground coal mines; and, if that were an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial legislature, by virtue either of s. 92, sub-s. 10, or s. 92, sub-s. 13. But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.

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Their Lordships see no reason to doubt that, by virtue of s. 91, sub-s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada. The learned judges who delivered opinions in the Full Court noticed the fact that the Dominion legislature had passed a "Naturalization Act, No. 113 of the Revised Statutes of Canada,," 1886 by which a partial control was exercised over the rights of aliens. Walkem, J., appears to regard that fact as favourable to the right of the provincial parliament to legislate for the exclusion of aliens being Chinamen from underground coal mines. The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

[1899] *A. C.* *p.* 588.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment appealed from; to find and declare that the provisions of s. 4 of the British Columbia Coal Mines Regulation Act, 1890, which are now embodied in chapter 138 of the Revised Statutes of British Columbia, 1897, were, in so far as they relate to Chinamen, ultra vires of the provincial legislature, and therefore illegal; (1) and to order that the plaintiffs do pay to the defendant company the costs incurred by them in both Courts below as the same shall be taxed. The respondents, other than the intervenant, must pay to the appellant company their costs of this appeal.

Solicitors for appellants: *Longbourne, Stevens & Co.*
Solicitors for intervenant: *Gard, Hall & Rook.*
Solicitors for other respondent: *Andrew Wood & Purves.*

(1) Dist. *Cunningham* v. *Tomey Homma, post,* p. 599.

MADDEN *v.* NELSON AND FORT SHEPPARD R.C. [1899], A. C. 626.

J. C.* 1899 *July* 19.

MADDEN AND ANOTHER (PLAINTIFFS) AND ATTORNEY-GENERAL FOR BRITISH COLUMBIA (INTERVENANT) . . . . } APPELLANTS;

AND

NELSON AND FORT SHEPPARD RAILWAY COMPANY (DEFENDANTS) AND ATTORNEY-GENERAL FOR THE DOMINION OF CANADA (INTERVENANT) . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Powers of Provincial Legislature—British Columbian Cattle Protection Acts, 1891, 1895.

The provision in the British Columbian Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, is ultra vires of the provincial parliament.

Canadian Pacific Ry. Co. v. *Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A. C. 367, distinguished.

Appeal from a decree of the Supreme Court (Aug. 19, 1897) reversing a decree of the county court for the district of Kootenay (Jan. 29, 1897) and entering judgment for the respondents, the railway company.

The action was brought to recover the value of two horses (one of them killed and the other injured) which had got on the railway of the respondent company by reason of there not being any fence on each side of the railway.

The plaintiffs relied upon the Cattle Protection Act, 1891, amended by ss. 2 and 3 of the Act of 1895. The defendants objected that, the railway having been declared by the Parliament of Canada to be a work for the general advantage of Canada, they were subject in respect thereof only to Dominion legislation, and were not subject to the Cattle Protection Act or any other Act of the legislature of British Columbia.

The First Court allowed this objection, but the Supreme Court

* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR EDWARD FRY, and SIR HENRY STRONG.

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overruled it, holding the Acts relied upon to be ultra vires of the provincial legislature so far as the respondent company was concerned.

Haldane, Q.C., and *Taylor, Q.C.*, for the appellants, contended that the Acts in question did not relate to any matter declared by s. 91 of the British North America Act, 1867, to be within the exclusive legislative authority of the Dominion. They related to property and civil rights within the province, and were therefore within s. 92, sub-s. 13. The specific civil rights within the province to which they related were those of cattle owners in respect of cattle killed or injured as therein mentioned upon a railway. The decision relied upon was that of *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1), decided since the judgment of the Supreme Court herein.

Blake, Q.C., and *Loehnis*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships are of opinion that in this case the judgment appealed from ought to be affirmed. The course of the argument has been rather to suggest that if there is no direct enactment in the statute (the Cattle Protection Act, 1891, 54 Vict. c. 1 (B.C.), as amended by the Cattle Protection Act, 1895, 58 Vict. c. 7 (B.C.))—the validity of which is in question—to create any erection or construction of the works of the railway that it would avoid the objection of the statute being ultra vires. But their Lordships are not disposed to yield to that suggestion, even if it were true to say that this statute was only an indirect mode of causing the construction to be made, because it is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly. But it is an under-statement of the difficulties in the way of the appellants to speak of it as an indirect operation of the statute to direct that this company should erect fences and provide against the particular class of accident which happened in this case, because the provincial legislature that passed this enactment seem to have been under the impression that they were not proceeding indirectly at all—that they were proceeding directly, and the preamble of their statute points out what they were intending to do. That preamble recites: "And whereas railway companies incorporated under the authority of the Parliament of Canada, or declared by the said Parliament to be for the general advantage of Canada, or for the advantage of two or more of the provinces, do not recognise any obligation on their part to fence against such cattle: And whereas it is just that such railway companies should, in the

[1899] *A. C.* *p.* 628.

(1) [1899] A. C. 367, *ante*, p. 558.

absence of proper fences, be held responsible for cattle injured or killed on their railways by their engines or trains." In other words, the provincial legislature have pointed out by their preamble that in their view the Dominion Parliament has neglected proper precautions, and that they are going to supplement the provisions which, in the view of the provincial legislature, the Dominion Parliament ought to have made ; and they thereupon proceed to do that which they recite the Dominion Parliament has omitted to do. It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the provincial parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them and is, therefore, manifestly ultra vires.

Their Lordships think it unnecessary to do more than to say that in this case the line seems to have been drawn with sufficient precision in the case of the *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1), where it was decided that although any direction of the provincial legislature to create new works on the railway and make a new drain and to alter its construction would be beyond the jurisdiction of the provincial legislature, the railway company were not exempted from the municipal state of the law as it then existed—that all landowners, including the railway company, should clean out their ditches so as to prevent a nuisance. It is not necessary to do more here than to say that this case raises no such question anywhere near the line, because in this case there is the actual provision that there shall be a liability on the railway company unless they create such and such works upon their roadway. This is manifestly and clearly beyond the jurisdiction of the provincial legislature.

[1899] A. C. p. 629.

The only further observation their Lordships have to make is that these propositions are sufficient to dispose of this case, and that, so far as the judgment in the Court below is concerned, they do not propose to adopt in all respects, or to agree with some of, the remarks made as to the state of the common law, and as to how the common law would have existed without this legislation. Although it is unnecessary to consider that point, their Lordships are not to be taken as adopting the reasons given by the judges in the Court below upon the common law. The reasons given by their Lordships justify them in saying they will humbly advise Her Majesty that this appeal be dismissed. There will be no order as to costs.

Solicitors for appellants : *Gard, Hall & Rook.*
Solicitors for respondents : *Charles Russell & Co.*

(1) [1899] A. C. 367, *ante*, p. 563.

J. C.* 1901 *July* 10, 11, 13; *Nov.* 22.

MANITOBA *v.* LIQUOR LICENCE HOLDERS [1902], A. C. 73.

ATTORNEY-GENERAL OF MANITOBA . . APPELLANT;

AND

MANITOBA LICENCE HOLDERS' ASSOCIATION . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH OF THE PROVINCE OF MANITOBA.

British North America Act, s. 92, sub-s. 16—Manitoba Liquor Act, 1900—*Powers of Local Legislature.*

The Manitoba Liquor Act of 1900 for the suppression of the liquor traffic in that province is within the powers of the provincial legislature, its subject being and having been dealt with as a matter of a merely local nature in the province within the meaning of British North America Act, 1867, s. 92, sub-s. 16, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly at least with business operations outside the province.

Attorney-General for Ontario v. *Attorney-General for the Dominion*, [1896] A. C. 348, followed.

Appeal by special leave from a judgment of the Court of King's Bench (Feb. 23, 1901).

[1902] *A. C. p.* 74.

The legislature of the province of Manitoba on July 5, 1900, passed an Act known as "The Liquor Act" (63 & 64 Vict. c. 22). The preamble of the Act is in these words: "Whereas it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor, therefore, &c." The enactments purport to prohibit all use in Manitoba of spirituous fermented malt and all intoxicating liquors as beverages or otherwise than for sacramental, medicinal, mechanical, or scientific purposes, and they include divers prohibitions and restrictions affecting the importation, exportation, manufacture, keeping, sale, purchase, and use of such liquors.

On February 23, 1901, the Court, on a reference thereto by the Lieutenant-Governor in Council, expressed its unanimous opinion that the said Act was unconstitutional; that the legislature of Manitoba had "exceeded its powers in enacting the Liquor Act as a whole."

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

The following facts were, by the submitting Order in Council, laid before the Court for consideration in dealing with the submission.

(*a*) "That at the time of the passing of the Liquor Act there were and are now in Manitoba brewers and maltsters, duly licensed under the Inland Revenue Act of Canada and amendments, by the Government of the Dominion of Canada, to carry on the trade or business of brewers and maltsters in Manitoba, and who then were and are now engaged under their said respective licences in manufacturing malt liquors and malt both for sale within and export from Manitoba, and selling within and exporting from Manitoba malt liquors and malt;

(*b*) "That at the time of the passing of the Liquor Act there were and now are in Manitoba a number of wholesale liquor dealers, engaged in buying and selling liquors by wholesale within the province, and in importing liquor by wholesale into the province from other provinces and countries, and in exporting from such province liquor so bought and imported;"

(*c*) "That at the time of passing the said Act many transactions took place and still take place in purchasing and selling liquor between residents of Manitoba and residents of other provinces and countries, both by way of import into Manitoba and export therefrom, and the Government of Canada derive revenue both from the importation of liquor into Canada and the manufacture of liquor therein."

[1902] *A. C.* *p.* 75.

Haldane, K.C., Colin Campbell, K.C. (*Attorney-General of Manitoba*), and *R. O. B. Lane, junior*, for the appellant, contended that the judgment should be reversed, and that the said Act should be held to be within the jurisdiction and powers of the local legislature. The matters dealt with thereby came within the classes of subjects enumerated in s. 92 of the British North America Act, and more especially in sub-ss. 13 and 16. Further, they contended that the matters dealt with thereby did not come within any of the subjects enumerated in s. 91. Also, that the Act did not conflict with any existing legislative provisions made by the Dominion Parliament, or with any provision which may hereafter be competently made thereby. Nor did it encroach upon the authority of the Dominion in any respect. It dealt with matters of a purely local nature in the province. Reference was made to ss. 91, 92, and 121 of the Act of 1867; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1); a Report to Her Majesty on a reference not in a

(1) [1896] A. C. 348, *ante*, p. 481.

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suit dated May 9, 1896; *Russell* v. *Reg.* (1); *Hodge* v. *Reg.* (2); *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (3).

Blake, K.C., and *Phippen*, for the respondents, contended that the Act was ultra vires the local legislature for the reasons appearing in the judgment of the Court below. It assumed to prevent, prohibit, and restrict dealings with liquor in respect of its importation, exportation, manufacture, sale, purchase, transportation, and use. Such provisions are in excess of any powers granted by s. 92, either those specifically enumerated in sub-s. 15 or those included in the general terms of sub-s. 16. They are also in conflict with Dominion powers, among which are the regulation of trade and commerce and the raising of money by indirect taxation. The Dominion is largely dependent on the excise and customs revenue from the manufacture and importation of liquor. The Act in question trenches on this source of revenue, and thus conflicts with s. 121 of the Act of 1867. It interferes with, limits, and prohibits interprovincial export and import trade in liquor, and with the systems of trade and taxation established under its exclusive powers by the Dominion Parliament. In particular it conflicts with existing Dominion legislation now in force in Manitoba by preventing distillers, brewers, and others licensed under the "Inland Revenue Act" from trading as licensed: see 31 Vict. c. 8. and R. S. C. c. 34, s. 9. It restricts the class of buildings within which they may ply their trade, and in which they may keep their manufactured goods. It conflicts also with regulations made by the Government under the authority of the Dominion Parliament respecting the sale of methylated spirits and spirits to be used for any mechanical or manufacturing purposes. It also makes illegal bonded warehouses established under the Inland Revenue Act, and interferes with the general control by the Inland Revenue Department over the business of all licences under that Act. Reference was made to ss. 163 (*b*), 165, 174, and 175, the latter as amended by 60 & 61 Vict. c. 19, s. 8.

[1902] *A. C.* *p.* 76.

Haldane, K.C., replied.

1901 *Nov.* 22.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In July, 1900, an Act was passed by the Legislature of Manitoba for the suppression of the liquor traffic in that province. The Act, which is known by its short title of "The Liquor Act," was to have come into operation on June 1, 1901.

(1) (1882) 7 App. Cas. 829, *ante*, p. 310. (2) (1883) 9 App. Cas. 117, *ante*, p. 333.
(3) [1897] A. C. 231, *ante*, p. 529.

Before that date, on a reference under c. 28 of the Revised Statutes of Manitoba, the Court of King's Bench pronounced the whole Act to be unconstitutional. From this decision the present appeal has been brought.

Although the questions submitted to the Court of King's Bench by the Lieutenant-Governor in Council were eleven in number, the only one considered in the Court below, and the only one argued before this Board, was the first: "Had the Legislative Assembly of Manitoba jurisdiction to enact the Liquor Act, and if not, in what particular or respect has it exceeded its power?" To this the answer given was, "It exceeded its powers in enacting the Liquor Act as a whole." The other questions are either of an academical character or such as are material only in the event of the Act being declared partially and not wholly unconstitutional. No answer that could be given to any of those questions would be of any practical value. Their Lordships, therefore, will confine their attention to the subject to which the judgment of the Court of King's Bench and the arguments at the bar were addressed. [1902] *A. C.* p. 77.

The question at issue depends on the meaning and effect of those sections in the British North America Act, 1867, which provide for the distribution of legislative powers between the Dominion and the provinces. The subject has been discussed before this Board very frequently and very fully. Mindful of advice often quoted (1), but not perhaps always followed, their Lordships do not propose to travel beyond the particular case before them.

The drink question, to use a common expression which is convenient if not altogether accurate, is not to be found specifically mentioned either in the classes of subjects enumerated in s. 91 and assigned to the Legislature of the Dominion, or in those enumerated in s. 92 and thereby appropriated to provincial legislatures. The omission was probably not accidental. The result has been somewhat remarkable. On the one hand, according to *Russell* v. *Reg.* (2), it is competent for the Dominion Legislature to pass an Act for the suppression of intemperance applicable to all parts of the Dominion, and when duly brought into operation in any particular district deriving its efficacy from the general authority vested in the Dominion Parliament to make laws for the peace, order, and good government of Canada. On the other hand, according to the decision in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3), it is not incompetent for a provincial legislature to pass a measure for the repression, or even for the total abolition, of the liquor [1902] *A. C.* p. 78.

(1) See *Citizens' Insurance Co.* v. *Parsons*, (1881) 7 App. Cas. 96, *ante*, p. 278.

(2) 7 App. Cas. 829, *ante*, p. 310.

(3) [1896] A. C. 348, *ante*, p. 481.

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traffic within the province, provided the subject is dealt with as a matter "of a merely local nature" in the province, and the Act itself is not repugnant to any Act of the Parliament of Canada.

In delivering the judgment of this Board in the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1), Lord Watson expressed a decided opinion that provincial legislation for the suppression of the liquor traffic could not be supported under either No. 8 or No. 9 of s. 92. His Lordship observed that the only enactments of that section which appeared to have any relation to such legislation were to be found in Nos. 13 and 16, which assigned to the exclusive jurisdiction of provincial legislatures (1.) "property and civil rights in the province," and (2.) "generally all matters of a merely local or private nature in the province." He added that it was not necessary for the purpose of that appeal to determine whether such legislation was authorized by the one or by the other of these heads. Although this particular question was thus left apparently undecided, a careful perusal of the judgment leads to the conclusion that, in the opinion of the Board, the case fell under No. 16 rather than under No. 13. And that seems to their Lordships to be the better opinion. In legislating for the suppression of the liquor traffic the object in view is the abatement or prevention of a local evil, rather than the regulation of property and civil rights—though, of course, no such legislation can be carried into effect without interfering more or less with "property and civil rights in the province." Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter.

The controversy, therefore, seems to be narrowed to this one point: Is the subject of "the Liquor Act" a matter "of a merely local nature in the province" of Manitoba, and does the Liquor Act deal with it as such? The judgment of this Board in the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1) has relieved the case from some, if not all, of the difficulties which appear to have presented themselves to the learned judges of the Court of King's Bench. This Board held that a provincial legislature has jurisdiction to restrict the sale within the province of intoxicating liquors so long as its legislation does not conflict with any legislative provision which may be competently made by the Parliament of Canada, and which may be in force within the province or any district thereof. It held, further, that there might be circum-

[1902] *A. C. p.* 79.

(1) [1896] A. C. 348, *ante*, p. 495.

stances (1) in which a provincial legislature might have jurisdiction to prohibit the manufacture within the province of intoxicating liquors and the importation of such liquors into the province. For the purposes of the present question it is immaterial to inquire what those circumstances may be. The judgment, therefore, as it stands, and the Report to Her late Majesty consequent thereon, shew that in the opinion of this tribunal matters which are "substantially of local or of private interest" in a province—matters which are of a local or private nature "from a provincial point of view," to use expressions to be found in the judgment—are not excluded from the category of "matters of a merely local or private nature," because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.

The Liquor Act proceeds upon a recital that "it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor." That is the declared object of the legislature set out at the commencement of the Act. Towards the end of the Act there occurs this section: "119. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the province of Manitoba, except under a licence or as otherwise specially provided by this Act, and restrict the consumption of liquor within the limits of the province of Manitoba, it shall not affect and is not intended to affect bonâ fide transactions in liquor between a person in the province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act shall be construed accordingly." Now that provision is as much part of the Act as any other section contained in it. It must have its full effect in exempting from the operation of the Act all bonâ fide transactions in liquor which come within its terms. It is not necessary to go through the provisions of the Act. It is enough to say that they are extremely stringent—more stringent probably than anything that is to be found in any legislation of a similar kind. Unless the Act becomes a dead letter, it must interfere with the revenue of the Dominion, with licensed trades in the province of Manitoba, and indirectly at least with business operations beyond the limits of the province. That seems clear. And that was substantially the ground on which the Court of King's Bench declared the Act unconstitutional. But all objections on that score are in their Lordships' opinion removed by the judgment

[1902] *A. C.* *p.* 80.

(1) See Report to Her Majesty, May 9, 1896.

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of this Board in the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1). Having attentively considered the very able and elaborate judgments of Killam, C.J., and Bain, J., in which Richards, J., concurred, and the arguments of counsel in support of their view, their Lordships are not satisfied that the Legislature of Manitoba has transgressed the limits of its jurisdiction in passing the Liquor Act.

Their Lordships will, therefore, humbly advise His Majesty that the judgment of the Court of King's Bench of the province of Manitoba dated February 23, 1901, ought to be discharged, and that in lieu thereof there ought to be substituted the following answers to the eleven questions submitted to it:—

1. In answer to the first question: That the Legislative Assembly of Manitoba had jurisdiction to enact the Liquor Act.

2. In answer to the questions numbered 2 to 11 both inclusive: That no useful answer can be given to these questions.

[1902] *A. C. p.* 81.

There will be no costs of this appeal.

Solicitors for appellant: *Harrison & Powell.*

Solicitors for respondents: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

LAMBE *v.* MANUEL [1903], A. C. 68.

J. C.* 1902 *July* 4, 7, *Nov.* 19.

LAMBE AND ANOTHER . . . . . PLAINTIFFS;

AND

MANUEL AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Quebec Succession Duty Act, 1892—*Construction—Quebec Taxes apply to Quebec Successions.*

Held, that taxes imposed on movable property by the Quebec Succession Duty Act of 1892 and the amending Acts apply only to property which the successor claims under or by virtue of Quebec law; and have no application to the several items in this case, which formed part of a succession devolving under the law of Ontario.

Appeal from a decree of the above Court (March 1, 1901) affirming a decree of the Superior Court (June 29, 1900) and dismissing the appellants' action.

* *Present:*—THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

(1) [1896] A. C. 348, *ante*, p. 495.

The appellant Lambe brought the action under the Quebec Act, 55 & 56 Vict. c. 17, as amended by 57 Vict. c. 16 and 58 Vict. c. 16, commonly called the "Succession Duty Act," and claimed penalties as well as taxes. In the course of the proceedings the Attorney-General intervened as representing the Crown and interested therein.

A retraxit was filed for both parties as to penalties, and the action was thereafter prosecuted for the taxes alone.

The respondent Manuel was sued as the executor and also the universal residuary legatee under the will of Allen Gilmour, deceased; and the Merchants' Bank of Canada, the Canadian Bank of Commerce, and David Law were joined as mis-en-cause, the former as banks on certain shares in which taxes were claimed, and the other as the mortgagor of certain lands, in respect of which mortgage also taxes were claimed.

The nature of the property and the applicable sections are set out in the judgment of their Lordships.

The appellants claimed that the property described is property situate in the province of Quebec, and also transferable and recoverable therein, and that the tax of 10 per cent. on its value, laid by the statute, is exigible by the Crown as represented in the province. [1903] *A. C.* p. 69.

The essence of the defence, which was upheld by both Courts, to the action was that, on the true construction of s. 1191 B of the Act of 1894, the property, being movable, was not "in the province of Quebec," but in the province of Ontario, the testator's domicil; and that therefore the tax is not exigible.

Blake, K.C., and *Duffy, K.C.*, for the appellants, contended that the Crown was entitled to the taxes as claimed. The property in question was at the testator's death in the province of Quebec under the definition of the clause laying the tax, namely, s. 1191 B. The shares in question in the Merchants' Bank stock had their situs within the province of Quebec, where the head office of the bank was situated, where they were transferable, and in whose Courts they were recoverable. The same conditions applied to the shares in the Canadian Bank of Commerce by virtue of their being in the Montreal register and transfer books. The immovable property comprised in Law's mortgage being within the same province, and the debtor being therein domiciled, and the asset being recoverable and transferable therein, it had also its situs within the province. Reference was made to *Blackwood* v. *Reg.* (1); *Harding* v. *Commissioners of Stamps* (2); *Hodge* v. *Reg.* (3); and see arts. 599, 600, and 6 of the Civil Code.

(1) (1882) 8 App. Cas. 82, 91.
(2) [1898] A. C. 769.
(3) (1883) 9 App. Cas. 117, *ante*, p. 353.

J. C. 1902

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Haldane, *K.C.*, *Fleet*, and *Manuel*, for the respondent Manuel, contended the Crown was not entitled to the taxes as claimed. The testator was not domiciled in Quebec but in Ontario, where he had been domiciled at and long before his death, which occurred in Ottawa. The assets referred to on the other side were all of them personalty referable by law to the law of his domicil under the rule "Mobilia personam sequuntur." By his death the testator's succession devolved by the laws of Ontario. The Act cannot deal with his succession as a whole, or with that part of it which is outside the jurisdiction of the Quebec legislature. The machinery provided by the Act for its working and the collection of the succession duty does not apply to the successions of persons dying or domiciled beyond the province of Quebec. The taxes in this case are in terms imposed on the transmission of property owing to death in the province of Quebec, and in this case no property has been so transmitted. No tax was imposed on successions of personalty where neither the testator nor the beneficiary were ever domiciled in the province of Quebec. Reference was made to *Harding's Case* (1); *Thomson* v. *Advocate-General* (2); *Wallace* v. *Attorney-General* (3); *Colquhoun* v. *Brooks* (4). *Blake*, *K.C.*, replied.

[1903] *A. C.* *p.* 70.

1902 *Nov.* 19.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This action, in which the Attorney-General for the province of Quebec has intervened, was brought by the collector of provincial revenue for the district of Montreal against the respondent John Manuel, sole acting executor and universal residuary legatee under the will of the late Allen Gilmour, a gentleman of considerable property who had his domicil in the province of Ontario. The object of the action was to recover succession taxes claimed to be due under the Quebec Succession Duty Act of 1892 and the Acts amending the same in respect of certain parts of the testator's estate as being "movable property . . . in the province."

The items in respect of which succession taxes were claimed are the following:—

1. Shares standing in the testator's name in the capital stock of the Merchants' Bank of Canada. The head office of the bank is in the city of Montreal, where its stock register and transfer books are kept.

[1903] *A. C.* *p.* 71.

2. Shares in the capital stock of the Canadian Bank of Commerce. The head office of that bank is in the city of Toronto. It has, how-

(1) [1898] A. C. 769.
(2) (1845) 12 Cl. & F. 1.
(3) (1865) L. R. 1 Ch. 1.
(4) (1889) 14 App. Cas. 493.

ever, a branch in Montreal, with a separate stock register and transfer books, in which transfers are entered and recorded, so that a certain portion of the capital of the bank is represented by shares registered and transferable in Toronto, and the remainder by shares registered and transferable in Montreal. On the application of the owner transfers are made from one register to the other. The testator's shares were at the time of his death standing in his name in the Montreal register.

3. A mortgage debt secured by hypothec on land in Montreal.

The taxes were claimed under the following provisions of the Quebec Succession Duty Acts:—

1191 B: "All transmissions, owing to death, of the property in, usufruct, or enjoyment of, movable and immovable property in the province shall be liable to the following taxes calculated upon the value of the property transmitted after deducting debts and charges existing at the time of the death.

* * * * * * * *

"3. If the succession devolves to a stranger, 10 per cent."

1191 D, sub-s. 5: "No transfer of the properties of any estate or succession shall be valid, nor shall any title vest in any person, if the taxes payable under this section have not been paid; and no executor trustee administrator curator heir or legatee shall consent to any transfers or payments of legacies unless the said duties have been paid."

The Superior Court unanimously rejected the plaintiff's claim, and the decision of that Court was unanimously affirmed by the Court of King's Bench.

The reasons of the learned judges were delivered by Sir Melbourne M. Tait, Acting Chief Justice, in the Superior Court, and by Bossé, J., in the Court of King's Bench.

Those reasons, stated shortly, are that according to their true construction the Quebec Succession Duty Acts only apply in the case of movables to transmissions of property resulting from the devolution of a succession in the province of Quebec, or, in other words, that the taxes imposed by those Acts on movable property are imposed only on property which the successor claims under or by virtue of Quebec law, and that in the present case the several items in respect of which succession taxes are claimed form part of a succession devolving under the law of Ontario (1).

[1903] *A. C.* *p.* 72.

The decisions of the Quebec Courts are, in their Lordships' opinion, entirely in consonance with well-established principles, which have been recognised in England in the well-known cases of *Thomson* v.

(1) Expl. *The King* v. *Lovitt*, *post*, p. 709.

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Advocate-General (1) and *Wallace* v. *Attorney-General* (2), and by this Board in the case of *Harding* v. *Commissioners of Stamps for Queensland* (3).

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed.

The appellants will pay the costs of the respondent Manuel, who alone defended this appeal.

Solicitors for appellants: *Charles Russell & Co.*
Solicitors for respondent Manuel: *Simpson & Co.*

J. C.* 1902
July 7, 8; *Nov.* 12.

ONTARIO MINING COMPANY *v.* SEYBOLD [1903], A. C. 73.

ONTARIO MINING COMPANY, LIMITED . PLAINTIFFS; AND ATTORNEY-GENERAL FOR CANADA (INTERVENING)

AND

SEYBOLD AND OTHERS . . . . . DEFENDANTS. AND ATTORNEY-GENERAL FOR ONTARIO (INTERVENING).

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *s.* 91—*Lands in Ontario surrendered by the Indians—Proprietary Right—Power of Disposition.*

Lands in Ontario surrendered by the Indians by the treaty of 1873 belong in full beneficial interest to the Crown as representing the province, subject only to certain privileges of the Indians reserved by the treaty. The Crown can only dispose thereof on the advice of the Ministers of the province and under the seal of the province.

St. Catherine's Milling Co. v. *Reg.*, (1888) 14 App. Cas. 46, followed.

The Dominion Government having purported, without the consent of the province, to appropriate part of the surrendered lands under its own seal as a reserve for the Indians in accordance with the said treaty:—

Held, that this was ultra vires the Dominion, which had by s. 91 of the British North America Act of 1867 exclusive legislative authority over the lands in question, but had no proprietary rights therein.

The consent of the province having been subsequently provided for by a

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

(1) 12 Cl. & F. 1. (2) L. R, 1 Ch. 1.
(3) [1898] A. C. 769.

statutory agreement between the two Governments, the special leave to appeal granted upon the representation of the general public importance of the question involved would probably have been rescinded if a petition to that effect had been made.

Appeal by special leave from a judgment of the Supreme Court (June 5, 1901) affirming a judgment of the Divisional Court of Ontario which had affirmed a judgment of the Chancellor of Ontario, who had dismissed the appellants' suit with costs.

The appellants, on February 15, 1899, brought their action in the High Court of Justice for Ontario to have it declared that, by virtue of certain letters patent issued by the Crown, as represented by the Government of the Dominion of Canada, to the plaintiffs' predecessors in title, the plaintiffs were the owners in fee simple of certain lands situate on Sultana Island, in the Lake of the Woods, in the province of Ontario, containing $110\frac{3}{4}$ acres, more or less, including the minerals, precious and base, therein; and that certain other letters patent subsequently issued by the Crown, as represented by the Government of the province of Ontario, comprising, inter alia, the same lands, were void, and were clouds upon the title of the plaintiffs, and should be ordered to be set aside and cancelled.

[1903] *A. C.* *p.* 74.

The respondent Johnston counter-claimed for a declaration that the appellants' patents were void.

The Chancellor of Ontario, under the circumstances, which were not disputed and are stated in their Lordships' judgment, dismissed the action and gave judgment on the counter-claim, declaring the appellants' patents to be void. His judgment, which was substantially affirmed by both the Appellate Courts, proceeded on the grounds that whilst over the Reserve 38 B (which included the lands in suit) the Dominion had legislative and administrative jurisdiction, the territorial and proprietary rights to the soil were vested in the Crown for the benefit of and subject to the legislative control of the province of Ontario; that by the surrender of 1886 the Indian title was extinguished for the benefit of the province, and that no estate could pass to the fee simple of the lands except from the Crown, as represented by the Ontario Government.

The Chief Justice (Sir Henry Strong), besides agreeing with the Chancellor, based his decision more particularly on the reasons given by the Judicial Committee in *St. Catherine's Milling Co.* v. *Reg.* (1).

The judgment of Gwynne, J., which was in favour of the appellants, was based upon the following grounds:—

"(*a*) That the British North America Act excluded all idea of any right of interference, direct or indirect, being possessed by or

(1) 14 App. Cas. 46, *ante*, p. 390.

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vested in the legislatures or governments of any of the provinces of the Dominion in relation to the Indians or their title to lands reserved for their benefit in any part of the Dominion;

"(*b*) That the British North America Act maintains the distinction between 'lands belonging to the several provinces' and 'Indian lands,' and preserved and maintained the Indians in the enjoyment of the benefit and conditions of all treaties entered into between them and the Sovereign;

[1903] *A. C.* *p.* 75.

"(*c*) That the reserves in this case must be regarded as lands vested in the Crown in trust for the sole use and benefit of the Indians upon the terms and conditions agreed upon as those upon which the trust was accepted by Her late Majesty;

"(*d*) That the provisions of the Indian Acts clearly shew the title of the Indians to lands reserved and the precious metals thereunder to be real and substantial and not illusory;

"(*e*) That unless the Proclamation of 1763 and the treaties made thereunder are a dead letter, and the provisions of the British North America Act relating to Indian lands are illusory and devoid of all significance, the sale by the Crown of their reserves, or such parts thereof as should be surrendered to the Crown upon trust to be sold for their benefit, are within the exclusive legislative authority of the Dominion Parliament;

"(*f*) That the lands in question are in a totally different position from the lands under consideration in the *St. Catherine's Milling Co.'s Case* (1);

"(*g*) That the letters patent to the appellants are therefore valid, and the letters patent under which the respondents claim are null and void in so far as they purport to affect the appellants' title to the land and minerals claimed by them."

Bicknell, K.C., and *Greer*, for the appellants, contended that judgment should be entered for them in terms of their claim. They relied upon the grounds taken by Gwynne, J. By the British North America Act, 1867, in order to ensure uniformity of administration, the British Parliament placed all lands held in trust for Indians and Indian affairs under the legislative control of the Dominion: see s. 91, sub-s. 24. It would be subversive of the policy of that Act to allow any interference by the provincial governments with Indian lands or Indian affairs. Sect. 109, which vests in the several provinces the lands situated therein, does so subject (1.) to any trust in respect thereof; (2.) to any interest other than that of the province. It was contended that the trusts then existing in respect of Indian

[1903] *A. C.* *p.* 76.

(1) 14 App. Cas. 46, *ante*, p. 390.

reserves, theretofore set apart by treaty, were continued. *St. Catherine's Milling Co.* v. *Reg.* (1) decides that the title in unsurrendered lands held by the Indians under the Proclamation of 1763 is "an interest other than that of the province" under this section. The consideration for the extinction of that interest in a very large tract of territory was the setting apart thereout of Indian reserves of 365,225 acres, which accordingly are to be dealt with by the Crown in the same way as the reserves held in trust in 1867. This case is not governed by *St. Catherine's Milling Co.* v. *Reg.* (1), for the lands in that case were of an entirely different nature. In them the Indian title had been extinguished for the public uses of the province. The lands now in suit are lands held by the Crown in trust to sell and dispose of them for the benefit of the Indians; and consequently there is no beneficial interest in them in the province of Ontario. What is called the surrender of these lands to the Crown is in reality a consent by the Indians, as required by the treaty, to the sale thereof by the Crown. It did not, and was not intended to, extinguish their title, but to consent to its conversion into money for their benefit. The reserves selected under the treaty never were lands belonging to the province within the meaning of s. 109. They belonged to the Crown, and neither to the Dominion nor to the province. They can only be disposed of by such statutory authority as is applicable to them. That statutory authority is vested in the Dominion, and the appellants have acquired title by virtue of Dominion legislation: see Consolidated Statutes of Canada, 1859, c. 9, ss. 10 to 18; and after 1867, 31 Vict. c. 42, 32 & 33 Vict. c. 6, 39 Vict. c. 18, and 43 Vict. c. 28; Revised Statutes of Canada, 1886, c. 43. Besides, the province of Ontario must be deemed to have acquiesced in the selection of reserves by the officers of the Dominion Government, and did not before the dealing with Reserve 38 B express any dissatisfaction therewith. [1903] *A. C.* p. 77.

Newcombe, K.C., and *Loehnis*, for the Attorney-General of the Dominion, contended that the letters patent under which the appellants claimed were issued by the Dominion pursuant to British North America Act, 1867, s. 91, sub-s. 24, and Revised Statutes of Canada, c. 43, s. 41. The title to the reserve in this case is vested in the Crown as representing the Dominion; if not, it has in its own right the power of sale and disposition over them, under a trust arising from the surrender in 1886. That surrender did not confer a like power on the province. Ontario has the benefit of the surrender, and cannot object to the execution of the stipulations made in favour of the Indians. Nor is her authority or consent necessary to the

(1) 14 App. Cas. 46, *ante*, p. 390.

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conversion of an Indian reserve into money for the benefit of the Indians.

Blake, K.C., for the Attorney-General of Ontario, contended that there was no question of general public importance affecting Ontario warranting the application for leave to appeal, and that accordingly the appeal should be dismissed on that ground alone. After the decision in *St. Catherine's Milling Co.* v. *Reg.* (1) Canada was advised that she had no right to create a reserve of the land in question, and that patents issued by her were void. She thereupon entered into negotiations with Ontario, which resulted in a statutory agreement under 54 & 55 Vict. (Canada) c. 5 and 54 Vict. (Ontario) c. 3, which is in force, though delays have occurred in its execution. The intention is to fulfil it, and it had before suit finally disposed of the question now raised.

J. M. Clark, K.C., for the respondents.

Newcombe, K.C., replied.

1902 *Nov.* 12.

The judgment of their Lordships was delivered by—

LORD DAVEY. In this case leave was given by His Majesty in Council, on the advice of this Board, to appeal against a judgment of the Supreme Court of Canada dated June 5, 1901. In their petition for leave to appeal the appellants, the Ontario Mining Company, alleged that the title to 365,225 acres of land, purporting to have been set aside by the Dominion Government as reserves for the Indians, was affected by the judgment, and represented that the question involved was one of great constitutional and general importance, affecting not only the Dominion and Provincial Governments, but also all the Indians in the province of Ontario. By the Order in Council giving the appellants leave to appeal it was ordered that the Government of the Dominion of Canada and the Government of the province of Ontario should be at liberty to intervene in the appeal, or to argue the same upon a special case raising the legal question or questions in dispute. The two Governments have availed themselves of this liberty, and were represented by counsel on the hearing of the appeal. A preliminary objection was taken to the appeal being heard on its merits by counsel for the respondents, and also by counsel for the Ontario Government, on the ground that the petition for leave to appeal did not disclose an agreement made between the Governments of the Dominion and of Ontario and confirmed by their two Legislatures respectively, which, it was said, if disclosed, would have shewn that the question between the parties to the litigation

[1903] *A. C.* *p.* 78.

(1) 14 App. Cas. 46, *ante*, p. 390.

did not, as alleged, affect the title to the large tract of land mentioned, and that in existing circumstances there was not any question of constitutional or general importance involved affecting either the Governments or the Indians. Their Lordships will postpone for the present their consideration of this objection.

The dispute is between rival claimants under grants from the Governments of the Dominion and of Ontario respectively. The appellants claim to be entitled to certain lands situate on Sultana Island, in the Lake of the Woods, within the province of Ontario, and the minerals thereunder, under letters patent, dated March 29, 1889, April 30, 1889, September 2, 1889, and July 23, 1890, issued by the Government of the Dominion to their predecessors in title. The respondents claim an undivided two-thirds interest in the same lands and minerals under letters patent issued to them by the Government of Ontario, and dated January 16, 1899, and January 24, 1899. The action was brought by the appellants against the respondents in the High Court of Justice of Ontario, and their claim was to have the letters patent of Ontario, under which the respondents claimed, declared void and set aside and cancelled, and for consequential relief. One of the respondents, on the other hand, counter-claimed for similar relief respecting the letters patent of the Dominion under which the appellants claimed title.

[1903] *A. C.* *p.* 79.

The lands in question are comprised in the territory within the province of Ontario, which was surrendered by the Indians by the treaty of October 3, 1873, known as the North-West Angle Treaty. It was decided by this Board in the *St. Catherine's Milling Co.'s Case* (1) that prior to that surrender the province of Ontario had a proprietary interest in the land, under the provisions of s. 109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty. In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the British North America Act, 1867, "it must always be kept in view that wherever public lands with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown." Their Lordships think that it should be added that the right of disposing

(1) 14 App. Cas. 46, *ante*, p. 400.

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of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

After the making of the treaty of 1873, the Dominion Government, in intended pursuance of its terms, purported to set out and appropriate portions of the lands surrendered as reserves for the use of the Indians, and among such reserves was one known as Reserve 38 B, of which the lands now in question form a part. The Rat Portage band of the Salteaux tribe of Indians resided on this reserve.

[1903] *A. C.* *p.* 80.

On October 8, 1886, the Rat Portage band surrendered a portion of Reserve 38 B, comprising the land in question, to the Crown, in trust to sell the same and invest the proceeds and pay the interest from such investment to the Indians and their descendants for ever. This surrender was made in accordance with the provisions of a Dominion Act known as the Indian Act, 1880. But it was not suggested that this Act purports, either expressly or by implication, to authorize the Dominion Government to dispose of the public lands of Ontario without the consent of the Provincial Government. No question as to its being within the legislative jurisdiction of the Dominion therefore arises.

The action was tried before the Chancellor of Ontario, and by his judgment of December 2, 1899, it was dismissed with costs. By a second judgment of December 22, 1899, on the counter-claim it was declared that the several patents under the Great Seal of Canada, under which the appellants claimed, were ultra vires of the Dominion and null and void as against the respondents. On appeal to the Divisional Court these judgments were affirmed.

The reasons of the learned Chancellor for his decision are thus summarized in his judgment.

"Over the Reserve 38 B the Dominion had and might exercise legislative and administrative jurisdiction, while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the province of Ontario. The treaty land was, in this case, set apart out of the surrendered territory by the Dominion—that is to say, the Indian title being extinguished for the benefit of the province, the Dominion assumed to take of the provincial land to establish a treaty reserve for the Indians. Granted that this might be done, yet when the subsequent surrender of part of this treaty reserve was made in 1886 the effect was again to free the part in litigation from the special treaty privileges of the band, and to leave the sole proprietary and

[1903] *A. C.* *p.* 81.

present ownership in the Crown as representing the province of Ontario. That is the situation so far as the title to the land is concerned."

The learned judge expressed his opinion that it was not proved that the Provincial Government had concurred in the choice or appropriation of the reserves, though in the view which he took of the case he considered it immaterial.

In the Divisional Court Street, J., expressed himself as follows:—

"The surrender was undoubtedly burdened with the obligation imposed by the treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it; but it is equally plain that its ownership of the tract of land covered by the treaty was so complete as to exclude the Government of the Dominion from exercising any power or authority over it. The act of the Dominion officers, therefore, in purporting to select and set aside out of it certain parts as special reserves for Indians entitled under the treaty, and the act of the Dominion Government afterwards in founding a right to sell these so-called reserves upon the previous acts of their officers, both appear to stand upon no legal foundation whatever. The Dominion Government, in fact, in selling the land in question, was not selling 'lands reserved for Indians,' but was selling lands belonging to the province of Ontario."

The Chief Justice adopted the reasons of the learned Chancellor.

There was a second appeal to the Supreme Court. The majority of the learned judges in that Court held that the case was governed by the decision of this Board in *St. Catherine's Milling Co.* v. *Reg.* (1), and the appeal was dismissed. Gwynne, J., dissented, but the reasons for his opinion given by that learned and lamented judge seem to be directed rather to shew that the decision of this Board in the previous case was erroneous. [1903] *A. C.* p. 82.

Their Lordships agree with the Courts below that the decision of this case is a corollary from that of the *St. Catherine's Milling Co.* v. *Reg.* (1) The argument of the learned counsel for the appellants at their Lordships' bar was that at the date of the letters patent issued by the Dominion officers to their predecessors in title the land in question was held in trust for sale for the exclusive benefit of the Indians, and therefore there was no beneficial interest in the lands left in the province of Ontario. This argument assumes that the Reserve 38 B was rightly set out and appropriated by the Dominion

(1) 14 App. Cas. 46, *ante*, p. 390.

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officers as against the Government of Ontario, and ignores the effect of the surrender of 1873 as declared in the previous decision of this Board. By s. 91 of the British North America Act, 1867, the Parliament of Canada has exclusive legislative authority over "Indians and lands reserved for the Indians." But this did not vest in the Government of the Dominion any proprietary rights in such lands, or any power by legislation to appropriate lands which by the surrender of the Indian title had become the free public lands of the province as an Indian reserve, in infringement of the proprietary rights of the province. Their Lordships repeat for the purposes of the present argument what was said by Lord Herschell in delivering the judgment of this Board in the *Fisheries Case* (1) as to the broad distinction between proprietary rights and legislative jurisdiction. Let it be assumed that the Government of the province, taking advantage of the surrender of 1873, came at least under an honourable engagement to fulfil the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result, however, is that the choice and location of the lands to be so appropriated could only be effectively made by the joint action of the two Governments.

[1903] *A. C. p.* 83.

It is unnecessary to say more on this point, for as between the two Governments the question has been set at rest by an agreement incorporated in two identical Acts of the Parliament of Canada (54 & 55 Vict. c. 5) and the Legislature of Ontario (54 Vict. c. 3), and subsequently signed (April 16, 1894) by the proper officers of the two Governments. In this statutory agreement it is recited that since the treaty of 1873 the true boundaries of Ontario had been ascertained and declared to include part of the territory surrendered by the treaty, and that, before the true boundaries had been ascertained, the Government of Canada had selected and set aside certain reserves for the Indians in intended pursuance of the treaty, and that the Government of Ontario was no party to the selection, and had not yet concurred therein; and it is agreed by art. 1 (amongst other things) that the concurrence of the province of Ontario is required in the selection. By subsequent articles provision is made, "in order to avoid dissatisfaction or discontent among the Indians," for full inquiry being made by the Government of Ontario as to the reserves, and in case of dissatisfaction by the last-named Government with any of the reserves already selected, or in case of the selection

(1) *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, &c.*, [1898] A. C. 700, *ante*, p. 551.

of other reserves, for the appointment of a joint Commission to settle and determine all questions relating thereto.

The learned counsel of the appellants, however, says truly that his clients' titles are prior in date to this agreement, and that they are not bound by the admissions made therein by the Dominion Government. Assuming this to be so, their Lordships have already expressed their opinion that the view of their relative situation in this matter taken by the two Governments was the correct view. But it was contended in the Courts below, and at their Lordships' bar was suggested rather than seriously argued, that the Ontario Government, by the acts and conduct of their officers, had in fact assented to and concurred in the selection of, at any rate, Reserve 38 B, notwithstanding the recital to the contrary in the agreement. The evidence of the circumstances relied on for this purpose was read to their Lordships; but on this point they adopt the opinion expressed by the learned Chancellor Boyd that the province cannot be bound by alleged acts of acquiescence on the part of various officers of the departments which are not brought home to or authorized by the proper executive or administrative organs of the Provincial Government, and are not manifested by any Order in Council or other authentic testimony. They, therefore, agree with the concurrent finding in the Courts below that no such assent as alleged had been proved.

[1903] *A. C.* p. 84.

It is unnecessary for their Lordships, taking the view of the rights of the two Governments which has been expressed, to discuss the effect of the second surrender of 1886. Their Lordships do not, however, dissent from the opinion expressed by the Chancellor of Ontario on that question.

To revert now to the preliminary objection, their Lordships do not desire to impute any want of good faith to the advisers of the appellants. They may have thought that their clients were not bound by the statutory agreement, and that it was not, therefore, necessary to mention it in their petition for leave to appeal. But the omission to do so was a grave and reprehensible error of judgment, for the existence of the agreement supplies an answer to the allegation of the general public importance of the questions involved, upon which the petition for leave to appeal was founded, as regards both the two Governments and the Indians. If the objection had been taken in a petition to rescind the leave granted, it would probably have succeeded, and their Lordships would now be amply justified in refusing to hear the appeal on its merits. But it was necessary to hear the argument in order to appreciate the objection; and the appeal has had this advantage, that it has enabled Mr. Blake, as

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counsel for Ontario, to state that he and the learned counsel for the Dominion, acting under authority from their respective Governments, have arranged terms for their adoption which will, it is hoped, have the effect of finally settling in a statesmanlike manner all questions between the Governments relating to the reserves.

[1903] *A. C.* p. 85.

Their Lordships will humbly advise his Majesty that the appeal should be dismissed. The appellants will pay the respondents' costs of it; but the interveners will neither pay nor receive costs.

Solicitors for appellants: *Harrison & Powell.*
Solicitor for respondents: *S. V. Blake.*
Solicitors for Dominion of Canada: *Charles Russell & Co.*
Solicitor for province of Ontario: *S. V. Blake.*

J. C.* 1902 *July* 4; *Dec.* 17.

CUNNINGHAM *v.* TOMEY HOMMA [1903], A. C. 151.

CUNNINGHAM AND ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . } APPELLANTS;

AND

TOMEY HOMMA AND ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

British North America Act, s. 91, *sub-s.* 25; *s.* 92, *sub-s.* 1—*Naturalization and Aliens—British Columbia Provincial Elections Act, s.* 8—*Powers of Provincial Legislature—Privileges conferred or withheld after Naturalization.*

Sect. 91, sub-s. 25, of the British North America Act, 1867, reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalization—that is, the right to determine how it shall be constituted.

The provincial legislature has the right to determine, under s. 92, sub-s. 1, what privileges, as distinguished from necessary consequences, shall be attached to it.

Accordingly, the British Columbia Provincial Elections Act (1897, c. 67), s. 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not ultra vires.

Appeal from an order of the above Supreme Court (March 9, 1901) affirming an order of the Chief Justice, sitting as county court judge (Nov. 30, 1900), which reversed the decision of the collector of voters, and ordered that the name of Tomey Homma be placed on the register of voters for the Vancouver electoral district.

* *Present:*—THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

In October, 1900, the said T. Homma, a native of the Japanese empire, not born of British parents, but a naturalized British subject, by notice given in the prescribed manner to the appellant, made the application now in question.

By the Provincial Elections Act of British Columbia (Revised Statutes of British Columbia, 1897, c. 67) it is enacted (amongst other things) as follows:

"3. The following terms shall in this Act have the meanings hereinafter assigned to them unless there is something in the context repugnant to such construction, that is to say—" [1903] *A. C.* p. 152.

* * * * * * * *

"The expression 'Chinaman' shall mean any native of the Chinese empire or its dependencies not born of British parents, and shall include any person of the Chinese race naturalized or not.

"The expression 'Japanese' shall mean any native of the Japanese empire or its dependencies not born of British parents, and shall include any person of the Japanese race naturalized or not.

"The expression 'Indian' shall mean any person of pure Indian blood."

* * * * * * * *

"7. Every male of the full age of twenty-one years, not being disqualified by this Act or by any other law in force in this province, being entitled within this province to the privileges of a natural-born British subject, having resided in this province for twelve months, and in the electoral district in which he claims to vote for two months of that period immediately previous to sending in his claim to vote, as hereinafter mentioned, and being duly registered as an elector under the provisions of this Act, shall be entitled to vote at any election: provided that no person shall be entitled to be registered or to vote as aforesaid who shall have been convicted of any treason, felony, or other infamous offence, unless he shall have received a free or conditional pardon for such offence, or have undergone the sentence passed upon him for such offence.

"8. No Chinaman, Japanese, or Indian shall have his name placed on the register of voters for any electoral district, or be entitled to vote at any election. Any collector of voters who shall insert the name of any Chinaman, Japanese, or Indian in any such register shall, upon summary conviction thereof before any justice of the peace, be liable to a penalty not exceeding $50."

By the Provincial Elections Act Amendment Act, 1899 (Statutes of British Columbia, 1899, c. 25), it is enacted (amongst other things) as follows:— [1903] *A. C.* p. 153.

"3. Section 7 of said chapter 67 is hereby amended by striking

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out the word 'twelve' in the fourth line thereof and substituting therefor the word 'six,' and by striking out the words 'two months' in the fifth line thereof and substituting therefor the words 'one month,' and by adding thereto as sub-s. 2 thereof the words following :—

"2. No judge of the Supreme or County Court, no sheriff or deputy sheriff, no employee of the provincial government who is in receipt of salary of at least $300 per annum, no sailor, marine, or soldier on full pay in the Imperial service, and no officer in the Imperial service on full pay, shall be entitled to have his name placed upon the register of voters for any electoral riding. This sub-section shall not apply to Ministers of the Crown, Mr. Speaker, members of the Legislative Assembly, or school teachers."

On October 19, 1900, the appellant, in obedience to s. 8 of the said Provincial Elections Act, disallowed the claim of Tomey Homma.

The County Court and the Supreme Court held that s. 8 of the Provincial Elections Act of British Columbia related to a matter, namely, "naturalization," which, by virtue of the British North America Act, 1867, s. 91, was within the exclusive legislative authority of the Parliament of Canada, and not within the jurisdiction of the legislature of British Columbia.

Robinson, K.C., and *C. A. Russell, K.C.*, for the appellants, the Attorney-General for the province having been joined as an intervenor with the collector, contended that the orders of the County and Supreme Courts were wrong, and should be reversed. They contended that it should be declared that Homma was not entitled to be placed on the register of voters. Sect. 8 referred to was not within the exclusive legislative authority of the Dominion. It does not relate to any matter declared by s. 91 of the British North America Act, 1867, to belong to the Dominion jurisdiction. See particularly sub-s. 25, which relates to naturalization and aliens—that is, to the mode in which naturalization is to be conferred, not to the rights which may or may not follow according to the electoral law of the district. That is a matter which is within the exclusive competence of the provincial legislature, being within the classes of subjects assigned to it by s. 92: see sub-s. 1. It is the provincial, and not the Dominion, legislature which has power to regulate the electoral law of the province, and to decide whether the respondent, naturalized by force of the Dominion Act, shall have a right to vote at the elections of members to serve in the provincial legislature. Such a right is not inherent in the respondent either as British born or as a naturalized

[1903] *A. C.* p. 154.

British subject. It is a right and privilege which belongs only to those classes of British subjects upon whom the provincial legislature has conferred it. Reference was made to *Union Colliery Co.* v. *Bryden* (1); *Fielding* v. *Thomas* (2).

Blake, K.C., for the respondent (*Newcombe, K.C.*, and *Loehnis*, with him, for the Attorney-General for the Dominion), contended that s. 8 in question is in respect of the respondent ultra vires of the provincial legislature. It trenches on the subject of aliens and naturalization. It attempts to impose on naturalized aliens of the Japanese race, on the score of their alien origin alone, a perpetual exclusion from the electoral franchise. It does so in spite of their being entitled within the province to all the privileges of natural-born British subjects, and in spite of their fulfilling all the conditions under which natural-born British subjects are entitled to the franchise. It thus nullifies, as it were, the Dominion legislation on the subject. Provincial legislatures are limited to matters of local as distinguished from Imperial concern. This legislation is calculated to create difficulties between the British and Japanese nations; but at the same time it cannot be checked by Imperial authority, which has a veto on Dominion but not provincial legislation: see British North America Act, 1867, ss. 56, 90. The Act should be so construed as to maintain to the full all limitations on provincial power in respect of matters affecting Imperial relations, and to retain them within the exclusive power of the Dominion. [1903] A. C. p. 155.

Robinson, K.C., replied.

Dec. 17. The judgment of their Lordships was delivered by

The Lord Chancellor. In this case a naturalized Japanese claims to be placed upon the register of voters for the electoral district of Vancouver City, and the objection which is made to his claim is that by the electoral law of the province it is enacted that no Japanese, whether naturalized or not, shall have his name placed on the register of voters or shall be entitled to vote. Application was made to the proper officer to enter the applicant's name on the register, but he refused to do so upon the ground that the enactment in question prohibited its being done. This refusal was overruled by the Chief Justice sitting in the county court, and the appeal from his decision to the Supreme Court of British Columbia was disallowed. The present appeal is from the decision of the Supreme Court.

There is no doubt that, if it is within the capacity of the province to enact the electoral law, the claimant is qualified by the express

(1) [1899] A. C. 580, 586, *ante*, p. 564. (2) [1896] A. C. 600, *ante*, p. 506.

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language of the statute; but it is contended that the 91st and 92nd sections of the British North America Act have deprived the province of the power of making any such provision as to disqualify a naturalized Japanese from electoral privileges. It is maintained that s. 91, sub-s. 25, enacts that the whole subject of naturalization is reserved to the exclusive jurisdiction of the Dominion, while the Naturalization Act of Canada enacts that a naturalized alien shall within Canada be entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled in Canada. To this it is replied that, by s. 92, sub-s. 1, the constitution of the province and any amendment of it are placed under the exclusive control of the provincial legislature. The question which their Lordships have to determine is which of these two views is the right one, and, in determining that question, the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider.

[1903] *A. C.* p. 156.

The first observation which arises is that the enactment, supposed to be ultra vires and to be impeached upon the ground of its dealing with alienage and naturalization, has not necessarily anything to do with either. A child of Japanese parentage born in Vancouver City is a natural-born subject of the King, and would be equally excluded from the possession of the franchise. The extent to which naturalization will confer privileges has varied both in this country and elsewhere. From the time of William III. down to Queen Victoria no naturalization was permitted which did not exclude the alien naturalized from sitting in Parliament or in the Privy Council.

In Lawrence's Wheaton, p. 903 (2nd annotated ed. 1863), it is said that "though (in the United States) the power of naturalization be nominally exclusive in the Federal Government, its operation in the most important particulars, especially as to the right of suffrage, is made to depend on the local constitution and laws." The term "political rights" used in the Canadian Naturalization Act is, as Walkem, J., very justly says, a very wide phrase, and their Lordships concur in his observation that, whatever it means, it cannot be held to give necessarily a right to the suffrage in all or any of the provinces. In the history of this country the right to the franchise has been granted and withheld on a great number of grounds, conspicuously upon grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign.

Could it be suggested that the province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the

mere mention of alienage in the enactment could make the law ultra vires, such a construction of s. 91, sub-s. 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

[1903] *A. C.* p. 157.

This, indeed, seems to have been the opinion of the learned judges below; but they were under the impression that they were precluded from acting on their own judgment by the decision of this Board in the case of *Union Colliery Co.* v. *Bryden* (1). That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.

For these reasons their Lordships will humbly advise His Majesty that the order of the Chief Justice in the county court and the order of the Supreme Court ought to be reversed, except so far as the respondent, Tomey Homma, is entitled to his costs under those orders. Having regard to the terms of the Order in Council giving special leave to appeal, their Lordships direct the appellants to pay the costs of Tomey Homma in this appeal, but that otherwise the parties shall pay their own costs.

Solicitors for appellants: *Gard, Rook & Winterbotham.*

Solicitor for respondent Homma: *S. V. Blake.*

Solicitors for Attorney-General for the Dominion: *Charles Russell and Co.*

(1) [1899] A. C. 587, *ante*, p. 570.

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10, 14.

ONTARIO *v.* HAMILTON STREET RLY. [1903], A. C. 524.

ATTORNEY-GENERAL FOR ONTARIO . . Appellant;

AND

THE HAMILTON STREET RAILWAY COMPANY AND OTHERS . . . . . } Respondents.

Appeals and Cross-Appeals.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Powers of Local Legislature—Ontario Act to prevent the Profanation of the Lord's Day ultra vires—Exclusive Power of the Dominion Parliament over Criminal Legislation—British North America Act, 1867, s. 91, *sub-s.* 27—*Practice as to Questions referred.*

Held, that "An Act to prevent the Profanation of the Lord's Day" (Revised Statutes of Ontario, 1897, c. 246) treated as a whole is ultra vires of the Ontario Legislature.

The criminal law in its widest sense is reserved by s. 91, sub-s. 27, of the British North America Act, 1867, for the exclusive authority of the Dominion Parliament; and an infraction of the above Act is an offence against criminal law.

It is not the practice of their Lordships to give speculative opinions on hypothetical questions submitted. The questions must arise in concrete cases and involve private rights.

Appeal from a judgment of the Court of Appeal (April 14, 1902) in respect of the answers to all the following questions except the first referred to that Court by the Lieutenant-Governor of Ontario, namely:—

1. Had the Legislature of Ontario jurisdiction to enact c. 246 of the Revised Statutes of Ontario, 1897, intituled "An Act to prevent the Profanation of the Lord's Day," and in particular ss. 1, 7, and 8 thereof?

2. (A) Had or has the Legislature of Ontario power by the aforesaid Act, or any Act of a similar character, to prohibit the doing or exercising of any worldly labour, business, or work on the Lord's Day within the province upon and in connection with the operation of lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings to which the exclusive legislative authority of the Parliament of Canada extends under the British North America Act, s. 21, sub-s. 29, and s. 92, sub-s. 10, A, B, C?

[1903] *A. C.* p. 525.

* *Present:*—The Lord Chancellor, Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson, and Lord Lindley.

(B) Had or has the Legislature of Ontario power to prohibit the doing or exercising of any worldly labour, business, or work on the Lord's Day within the province, when such prohibition would affect any matter to which the exclusive legislative authority of the Parliament of Canada extends under any other sub-section of said s. 91, as, for example, sub-ss. 5, 10, and 13?

3. In s. 1 of said statute, Revised Statutes of Ontario, c. 246, or the Consolidated Statute of Upper Canada, c. 104, as the case may be, do the words "other person whatsoever" include all classes of persons other than those enumerated who may do any act prohibited by said section, or is the meaning of these words limited so as to apply only to persons ejusdem generis with the classes enumerated?

4. Subject to the exceptions therein expressed, does said s. 1 prohibit individuals who for or on behalf of corporations do the labour and work or exercise the business of carrying passengers for hire from doing such labour and work and exercising such business on the Lord's Day, whether the corporations for or on behalf of which the work or labour is done are or are not within the prohibition of the said section?

5. Do the words "conveying travellers," as used in said s. 1, apply exclusively to the carrying to or towards their destination of persons who are in the course of a journey at the commencement of the Lord's Day?

6. Does the said s. 1 apply to and include corporations?

7. (A) Do the words "work of necessity," as used in said s. 1, apply so as to include the doing of that which is necessary for the care or preservation of property so as to prevent irreparable damage other than mere loss of time for the period during which the prohibition extends?

(B) If so, is the necessity contemplated by the statute only that which arises from the exigency of particular and occasional circumstances, or may such necessity grow out of or be incident to a particular manufacture, trade, or calling? [1903] A. C. p. 526.

(C) If such necessity may grow out of or be incident to a particular manufacture, trade or calling, do the words "work of necessity" apply exclusively to the doing on the Lord's Day of that without which the particular manufacture, trade, or calling cannot successfully be carried on during the remaining six days of the week?

The respondents to the appeal were the Hamilton Street Railway Company, the Metropolitan Railway Company, the Grand Trunk Railway Company of Canada, the Niagara Navigation Company, the Willson Carbide Company of St. Catherine's, Limited, Walter Barwick, the Ontario Lord's Day Alliance, and the Attorney-General for the

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Dominion. Several of the respondents cross-appealed as to the answer to the first question.

The Court of Appeal answered the first question in the affirmative, the second in the negative. As regards the third question, the answer to its first branch was negative and to its second affirmative. The fourth, fifth, and sixth questions were answered in the negative. 7 (A), 7 (B), and 7 (C) were not answered.

The judgment of their Lordships overruled the answer of the Court to the first question.

Paterson, K.C., for the appellant, contended that the first question was rightly answered in the affirmative; and that the second should also have been answered in the affirmative. The provincial legislatures had since confederation assumed to legislate as to Sunday observance, while the Dominion never attempted to do so and never disputed the provincial right. The Act in question is a dealing with property and civil rights under s. 92, sub-s. 13, of the British North America Act of 1867. It did so by preventing work on Sundays. It came within matters of a local or private nature under s. 92, sub-s. 16. It had no relation to religion or to criminal law. A crime is an indictable offence; fine or imprisonment being attached to a provincial law did not make it a criminal enactment. The Act is not applicable to the whole community. As to question No. 2, the prohibitions referred to come within s. 92, sub-ss. 13 and 16. Reference was made to *City of Fredericton* v. *Reg.* (1).

[1903] *A. C.* p. 527.

A. E. O'Meara, for the Lord's Day Alliance, contended that the subject of the Act in question was a matter of civil right and not of criminal law. That disobedience to a statute is not always indictable, see *Reg.* v. *Buchanan* (2); *Reg.* v. *Hall* (3). As to civil rights, see *Jones* v. *Stanstead Ry. Co.* (4); *Cushing* v. *Dupuy* (5); *Tennant* v. *Union Bank of Canada* (6); *Attorney-General for Ontario* v. *Attorney-General for Canada* (7); *Citizens' Insurance Co.* v. *Parsons* (8); *Bank of Toronto* v. *Lambe* (9); *Phillips* v. *Innes* (10); *Reg.* v. *Wason* (11); *Union Colliery Co.* v. *Bryden* (12).

Aylsworth, K.C., for Walter Barwick and others, who filed a joint case, contended that the answer of the Court to the first question

(1) (1880) 3 Sup. Ct. Rep. 532.
(2) (1846) 8 Q. B. 883.
(3) [1891] 1 Q. B. 747.
(4) (1872) L. R. 4 P. C. 98, 116.
(5) (1880) 5 App. Cas. 409, *ante*, p. 253.
(6) [1894] A. C. 31, *ante*, p. 433.
(7) [1896] A. C. 348, *ante*, p. 481.
(8) (1881) 7 App. Cas. 96, *ante*, p. 267.
(9) (1887) 12 App. Cas. 575, 581. *ante*, p. 378.
(10) (1837) 4 Cl. & F. 234, 240; 42 R. R. 19.
(11) (1890) 4 Cartwright, 578, 614; S.C. 17 Ont. App. Rep. 221.
(12) [1899] A. C. 580, *ante*, p. 564.

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should have been in the negative in accordance with the opinion to that effect of the Chief Justice. The Act in question was originally enacted by the Parliament of the late province of Canada before 1867, which was competent for the purpose. So far as it has been unaltered it is applicable to the province of Ontario. Its re-enactment by the local legislature was superfluous. And at least the modifications introduced by ss. 1, 7, and 8 referred to in the question are ultra vires. The answer to the first question turns upon whether the local Act enacts a criminal law within the meaning of s. 91, sub-s. 27, of the Act of 1867. One test is whether the Act was passed to punish an offence in the interest of public morality or to regulate civil rights between individuals. Another is whether it deals with a matter which at common law or by statute fell within criminal jurisdiction. The profanation of the Lord's Day was an indictable offence at common law; a form of indictment against a Sabbath-breaker in keeping open shop is given in 2 Chitty's Criminal Law, 2nd ed. p. 20. The Act is based on the ground that it is immoral and against peace and good order to profane the Sabbath. Prior to confederation the provincial Lord's Day Act was part of the criminal law of Nova Scotia. And the subject of Sunday observance had before confederation been embodied in the criminal law of Upper Canada by a competent legislature: see Con. St. Upper Canada, c. 104. The primary object of the Act under consideration was the promotion of public order, safety and morals, and not the regulation of civil rights as between subject and subject. Reference was made to *Reg.* v. *Wason* (1); *Reg.* v. *Lawrence* (2); *Reg.* v. *Boardman* (3); *Fisheries' Case* (4).

[1903] *A. C.* p. 528.

Newcombe, K.C., and *Loehnis*, for the Dominion of Canada.

Osler, K.C., and *L. L. Batten*, for the Grand Trunk Railway.

The Hamilton Street Railway did not appear.

1903 *July* 14.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships are of opinion that the Act in question, Revised Statutes of Ontario, 1897, c. 246, intituled "An Act to prevent the Profanation of the Lord's Day," treated as a whole was beyond the competency of the Ontario Legislature to enact, and they are accordingly of opinion that the first question which was referred to the Court of Appeal for Ontario by the Lieutenant-Governor, pursuant to c. 84 of the Revised Statutes of Ontario, 1897, ought to be answered in the negative.

(1) 4 Cartwright, 578.
(2) (1878) 1 Cartwright, 742; S.C. 43 U. C. Q. B. 164.
(3) (1871) 1 Cartwright, 676; S.C. 30 U. C. Q. B. 553.
(4) [1898] A. C. 700, *ante*, p. 542.

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The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. Sect. 91, sub-s. 27, of the British North America Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada "the criminal law, except the constitution of Courts of criminal jurisdiction." It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation at the time of confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception, namely, "the constitution of Courts of criminal jurisdiction," renders it more clear, if anything were necessary to render it more clear, that with that exception (which obviously does not include what has been contended for in this case) the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament.

[1903] *A. C.* p. 529.

Their Lordships' opinion on the first question renders it unnecessary to answer the second.

With regard to the remaining questions, which it has been suggested should be reserved for further argument, their Lordships are of opinion that it would be inexpedient and contrary to the established practice of this Board to attempt to give any judicial opinion upon those questions. They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it.

Their Lordships will, therefore, humbly advise His Majesty that the first question ought to be answered in the negative, and that no answers ought to be given to the questions 3 to 7 inclusive. There will be no order as to the costs of these appeals.

[1903] *A. C.* p. 530.

Solicitors for appellant: *Blake & Redden.*

Solicitors for Ontario Lord's Day Alliance: *Fox & Reeve.*

Solicitors for Barwick, Metropolitan Railway, and another: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for Attorney-General for the Dominion: *Charles Russell and Co.*

Solicitors for Grand Trunk Railway: *Batten, Proffitt & Scott.*

PRINCE EDWARD ISLAND *v.* CANADA [1905], A. C. 37.

J. C.* 1904

July 20, 21; *Nov.* 4.

ATTORNEY-GENERAL FOR THE PROVINCE OF PRINCE EDWARD ISLAND . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENT.

ATTORNEY-GENERAL FOR THE PROVINCE OF NEW BRUNSWICK . . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, s. 51, *sub-s.* 4; *ss.* 3 *and* 146—*Readjustment of Representation—Construction—"Aggregate Population of Canada."*

Sect. 51 of the British North America Act, 1867, directs after each decennial census a readjustment of the representation in the Dominion House of Commons of the four provinces constituted by that Act. It provides as the rule of readjustment that Quebec shall have the fixed number of sixty-five representatives, and that each of the other provinces shall have that number which bears the same proportion to its population as sixty-five bears to that of Quebec. But its sub-s. 4 prohibits a reduction of the number of the representatives in the case of any province unless the proportion which the number of its population bore to the number of the aggregate population of Canada at the last preceding readjustment is ascertained at the then latest census to have been diminished by one-twentieth part or upwards. [1905] *A. C.* p. 38.

Held, on a case submitted to the Supreme Court of Canada as to whether New Brunswick was protected from reduction of its members, that on the true construction of sub-s. 4 the expression "aggregate population of Canada" relates to the whole of Canada as constituted by the Act, and therefore includes, not merely the four provinces constituted by proclamation issued under s. 3, but also all the provinces subsequently incorporated and admitted into the Union by Order in Council under s. 146:

* *Present:*—LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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Held, also, with regard to the province of Prince Edward Island, which had under s. 146 been admitted into the Union by Order in Council directing that it should have six members, its representation to be readjusted from time to time under the provisions of the Act of 1867, that sub-s. 4 on its true construction did not protect that number from reduction until an increase thereof had been previously effected.

The first of these appeals was from a judgment of the Supreme Court (June 8, 1903) upon a case submitted by Order in Council under the Supreme and Exchequer Courts Act (Revised Statutes of Canada, c. 135), as amended by Act 54 & 55 Vict. c. 25, which raised the following question:—

"Although the population of Prince Edward Island as ascertained at the census of 1901, if divided by the unit of representation ascertained by dividing the number of sixty-five into the population of Quebec is not sufficient to give six members in the House of Commons of Canada to that province, is the representation of Prince Edward Island in the House of Commons of Canada liable, under the British North America Act, 1867, and amendments thereto and the terms of Union of 1873 under which that province entered Confederation, to be reduced below six, the number granted to that province by the said terms of Union of 1873?"

The Supreme Court of Canada answered in the affirmative, deciding that the representation of the province is liable to be reduced according to each decennial census if the unit of representation under the British North America Act is large enough to produce that result.

[1905] *A. C.* p. 39.

After that judgment was delivered an Act was passed by the Parliament of Canada (3 Edw. 7, c. 60) under which, upon the dissolution of the then existing Parliament, four members only were to be elected to the House of Commons for the province of Prince Edward Island. In 1892 Act 55 & 56 Vict. c. 11 had reduced the number to five.

Taschereau, C.J., held that it was provisionally that the island was given six members till its representation was readjusted with that of the other provinces as provided for by s. 51. The 12th resolution of the Order in Council (set out in their Lordships' judgment on p. 47) must be construed as meaning that the representation of the province shall be readjusted after every decennial census, its representation in the meantime to be composed of six members. He concluded: "I am of opinion that as by the federal census of 1901 the population of Prince Edward Island divided by the unit of representation ascertained by dividing the number of sixty-five into the population of Quebec is not sufficient to give six members in the House of Commons to that province, the

representation of that province must be readjusted and reduced proportionately to population as provided for by s. 51."

The second appeal was from a judgment of the Supreme Court (April 29, 1903) on the following question referred to it by the Governor in Council:—

"In determining the number of representatives in the House of Commons, to which Nova Scotia and New Brunswick are respectively entitled after each decennial census, should the words 'aggregate population of Canada' in sub-s. 4 of s. 51 of the British North America Act, 1867, be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada, including that of provinces which had been admitted to the Confederation subsequent to the passage of the British North America Act?"

The Supreme Court's answer was that the words "aggregate population of Canada" in sub-s. 4 of s. 51 of the British North America Act, 1867, should be construed as meaning the whole population of Canada, including that of provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act.

[1905] *A. C.* p. 40.

Aylesworth, *K.C.*, and *Peters*, *K.C.*, for Prince Edward Island, contended that the answer to the question should have been in the negative. Under the terms of the British North America Act and of the resolutions under which the island entered the Union, it was intended that the province should retain six members; that the number should never be less. If the result of any decennial census should be that the province was entitled, according to its population, to more than six members, and the number thereof accordingly be increased, then any additional representation so given beyond the original six would always afterwards be subject to reduction, if the result of any subsequent census should make it necessary. In aid of this contention they referred to various circumstances surrounding and preceding the terms of union, and particularly to correspondence between the negotiating governments, their minutes and journals. It was within the power of the Dominion Government to make special terms and agreements with any province on its admission, provided such terms were ratified by Order in Council and confirmed by legislative enactment. The island was admitted on July 1, 1873, and its position depends on the terms then made and on the British North America Act, ss. 37, 51, and 52. They contended that a minimum representation of six was one of those terms—not as a

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matter of right, or as a matter of giving representation by population, but because of the peculiar position of the island. It was not intended to be temporary and liable to diminution at the next census. With regard to Act 55 & 56 Vict. c. 11, which reduced the representation to five, that alone could not affect an Imperial statute which had given six as a minimum. With regard to the British North America Act, 1867, the only changes in representation contemplated are of increase from the original numbers, with diminutions (if subsequently necessary) from such increase: see s. 52. It was contended that s. 51 applied only to the four provinces mentioned in s. 37, the section which fixed the total number of members, and the number for each of the four provinces. It was s. 146 which provided for additional provinces being admitted to the Union, on terms to be fixed in each case separately. In the case of the island it was agreed that it should always have at least six members—two for each of its three counties. The stipulation for readjustment under the provisions of the Act of 1867 implies only readjustment by way of increase, subject to subsequent restriction, but never below the minimum of six. There is no provision in the Act of 1867 which contemplates reduction below the number originally fixed. Sub-s. 4 of s. 51 is merely negative, protecting from reduction except where there has been a previous increase. Under the British North America Act, 1871 (Imperial), c. 28, the Dominion Parliament, with the consent of a province, may enlarge its limits. 61 Vict. c. 3 has enlarged the limits of Quebec, and the increased population so obtained will lead to a decennial increase of the limit of representation, with corresponding diminution in the representation of the island, whose boundaries do not admit of expansion. This could not have been the intention, and in interpreting an instrument of federal union the Court should apply principles of construction more liberal and broad than are applicable to private contracts so as to get at the true intention. The union in this case was under s. 146 subject to the provisions of the Act. That means that its terms must not be inconsistent with the general and specific provisions thereof, under which a number of members is assigned to the whole House and to each province, which may be increased, but which must not be diminished.

Pugsley, K.C., and *R. J. Parker*, for New Brunswick, contended that upon the true construction of s. 51 it relates only to the proportionate representation of the original four provinces of the Dominion, and not to the representation of any province subsequently admitted thereto. Sect. 146 is the only section which authorizes a subsequent admission. Thereunder the representation

of an admitted province is left to be determined by the several legislative Acts or orders under which such admission is effected. By Imperial proclamation (May 22, 1867) the Dominion of Canada came into existence under the Act of 1867, composed of the four provinces. In 1870 the North-West Territory and Rupert's Land were admitted to the Union on terms which did not provide for the representation of either in the Dominion Parliament. The province of Manitoba was also admitted in that year on terms which assigned to it a number of members out of all proportion to the number of its population, calculated on the basis provided by the Act of 1867 for the four original provinces, which led to the British North America Act, 1871 (34 & 35 Vict. c. 28), being passed by the Imperial Parliament. In that year, 1871, British Columbia was admitted with three members in the Senate and six in the House of Commons, the representation to be increased under the provisions of the Act of 1867. In 1873 Prince Edward Island was admitted. The Dominion at the present time includes other territories, whose representation is provided for by the British North America Act, 1886, which does not provide in their case for any readjustment according to s. 51 of the Act of 1867. They contended that under these circumstances it was not competent for the Canadian Parliament to reduce the number of members for New Brunswick from fifteen to thirteen as provided by the redistribution proposed after the decennial census of 1901. The words "aggregate population of Canada" in sub-s. 4 of s. 51 meant the aggregate population of the four original provinces constituted by the Act of 1867, and not the aggregate population increased by that of subsequently admitted provinces and territories. Calculated upon that basis, the population of New Brunswick had not proportionately decreased to the extent provided for by that sub-section. Consequently the condition precedent to reduction had not been fulfilled. The proportionate representation of the four provinces is fixed by s. 51. It cannot be and it never was intended that it should be altered by subsequent arrangements between the Dominion and candidates for admission thereto, to which the four provinces in question are not parties, and over which they have no control.

Blake, K.C., Lemieux, K.C., Newcombe, K.C., and *F. Russell*, for the Dominion, were not heard.

1904. Nov. 4. The judgment of their Lordships was delivered by [1905] *A. C.* *p.* 43.

Sir Arthur Wilson. These appeals have been brought against two decisions of the Supreme Court of Canada upon two questions

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referred to that Court for its opinion by Order in Council under the Canadian Act, 54 & 55 Vict. c. 25. The two questions have arisen out of the same occurrences, though different considerations apply to them, and the two appeals were argued together. They may conveniently be disposed of in one judgment.

The British North America Act, 1867, s. 3, empowered Her late Majesty in Council to declare by proclamation that, on and after a day therein appointed, not being more than six months after the passing of the Act, the provinces of Canada, Nova Scotia, and New Brunswick should form and be one Dominion under the name of Canada; and on and after that day those three provinces were to form and be one Dominion under that name accordingly.

Sect. 1 said: "The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the day appointed for the Union taking effect in the Queen's Proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act."

Sect. 5 said: "Canada shall be divided into four provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick."

Sect. 8 said: "In the general census of the population of Canada which is hereby required to be taken in the year one thousand eight hundred and seventy-one, and in every tenth year thereafter, the respective populations of the four provinces shall be distinguished."

Sect. 37 said: "The House of Commons shall, subject to the provisions of this Act, consist of one hundred and eighty-one members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick."

[1905] *A. C.* *p.* 44.

Sect. 51 is as follows: "On the completion of the census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four provinces shall be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:—

"(1.) Quebec shall have the fixed number of sixty-five members.

"(2.) There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained).

"(3.) In the computation of the number of members for a province

a fractional part not exceeding one-half of the whole number requisite for entitling the province to a member shall be disregarded; but a fractional part exceeding one-half of that number shall be equivalent to the whole number.

"(4.) On any such readjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the then last preceding readjustment of the number of members for the province is ascertained at the then latest census to be diminished by one twentieth part or upwards.

"(5.) Such readjustment shall not take effect until the termination of the then existing Parliament."

By s. 52 the number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the provinces prescribed by the Act is not thereby disturbed.

Sect. 146 is as follows: "It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on addresses from the Houses of the Parliament of Canada, and from the Houses of the respective legislatures of the Colonies or provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or provinces, or any of them, into the Union, and on address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

[1905] *A. C.* *p.* 45.

Canada in the widest sense of the term now comprises, in addition to the four original provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, three other provinces which have entered the Dominion at various dates subsequent to its first formation—Manitoba, British Columbia, and Prince Edward Island. It also comprises certain territories which have not received the organisation of provinces.

It will be convenient here to notice briefly certain of the circumstances connected with the admission of each of the new provinces into the Dominion, for some argument was based upon them. Manitoba was the first of the new provinces, and it was carved out of Rupert's Land and the North-Western Territory referred to in s. 146 of the British North America Act, 1867.

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An Order in Council, based upon an address as contemplated by that section, was issued on June 24, 1870, by which Rupert's Land and the North-Western Territory were made part of the Dominion of Canada. In preparation for this Order in Council, at a time when it was expected but had not actually issued, the Canadian Act, 33 Vict. c. 3, was passed. It enacted that from the time when the expected Order in Council should incorporate Rupert's Land and the North-Western Territory there should be carved out of them the province of Manitoba.

It was added by s. 2 that: "On, from and after the said day on which the Order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to, or only to affect, one or more, but not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the province of Manitoba, in the same way, and to the like extent as they apply to the several provinces of Canada, and as if the province of Manitoba had been one of the provinces originally united by the said Act"; and by s. 4 that: "The said province shall be represented, in the first instance, in the House of Commons of Canada, by four members, and for that purpose shall be divided by proclamation of the Governor-General into four electoral districts, each of which shall be represented by one member: Provided that on the completion of the census in the year 1881, and of each decennial census afterwards, the representation of the said province shall be readjusted according to the provisions of the fifty-first section of the British North America Act, 1867."

This Canadian Act was affirmed and full validity given to it by the Imperial British North America Act, 1871 (34 & 35 Vict. c. 28).

British Columbia was admitted into the Dominion by an Order in Council bearing date May 16, 1871, which was based upon addresses as contemplated by s. 146 of the Act of 1867 and embodied their terms. It is only necessary to refer to the following:—

Sect. 8: "British Columbia shall be entitled to be represented in the Senate by three members, and by six members in the House of Commons. The representation to be increased under the provisions of the British North America Act, 1867."

Sect. 10: "The provisions of the British North America Act, 1867, shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to, and only affect, one and not the whole of the provinces now comprising

the Dominion, and except so far as the same may be varied by this minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces of the Dominion, and as if the Colony of British Columbia had been one of the provinces originally united by the said Act."

Prince Edward Island was made part of the Dominion of Canada by Order in Council dated June 26, 1873, which like its predecessor was based upon, and embodied the terms of, the addresses contemplated by the statute. It is only necessary to notice one clause (12):—

"That the population of Prince Edward Island having been increased by fifteen thousand or upwards since the year 1861, the island shall be represented in the House of Commons of Canada by six members; the representation to be readjusted from time to time under the provisions of the British North America Act, 1867."

With regard to the territories not included in provinces it is sufficient to say that the Imperial British North America Act, 1886 (49 & 50 Vict. c. 35), gave full power to the Canadian Legislature to provide for the parliamentary representation of territories, and Acts of the Canadian Legislature have from time to time conferred upon the inhabitants of the territories rights of representation in the Dominion Parliament, on a more liberal scale, it was stated, than would result from a strict application of the usual rule of proportion.

In 1871, and in each tenth year from that time, a census of the Dominion has been taken in accordance with s. 8 of the British North America Act, 1867. And each such census has been followed by an Act of the Dominion Parliament to readjust the representation of the provinces, in conformity with the results disclosed by the census, according to the principles embodied in s. 51.

Such a census was taken in 1901, and in 1903 followed the Act readjusting representation. That Act as passed reduced the number of representatives in the House of Commons of certain of the provinces of the Dominion, of which it is only necessary to mention New Brunswick, whose members were reduced in number from 14 to 13, and Prince Edward Island whose members fell from 5 to 4.

Each of these provinces objected to the principles upon which the readjustment had been carried out, and with respect to each of these provinces a question was submitted by Order of the Governor-General in Council for the opinion of the Supreme Court.

New Brunswick was one of the four original provinces of the

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Dominion, and in her case there could be no doubt of the applicability of s. 51 of the Act of 1867; the only doubt suggested was as to its construction. The question submitted was this:—

"In determining the number of representatives in the House of Commons to which . . . . New Brunswick . . . . is entitled after each decennial census, should the words 'aggregate population of Canada' in sub-s. 4 of s. 51 of the British North America Act, 1867, be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada including that of provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act?"

Prince Edward Island was not one of the four original provinces, but was incorporated in the Dominion in 1873 on terms which have been sufficiently noticed. On her behalf considerations were raised of a somewhat different character from those in the case of New Brunswick. The question submitted to the Supreme Court in the case of Prince Edward Island was this:—

"Although the population of Prince Edward Island, as ascertained at the census of 1901, if divided by the unit of representation ascertained by dividing the number of 65 into the population of Quebec is not sufficient to give six members in the House of Commons of Canada to that province, is the representation of Prince Edward Island in the House of Commons of Canada liable under the British North America Act, 1867, and amendments thereto, and the terms of Union of 1873 under which that province entered Confederation, to be reduced below six, the number granted to that province by the said terms of Union of 1873?"

The case relating to New Brunswick was the first to come before the Supreme Court, and in that case the learned judges answered the question laid before them to the effect that "the words 'aggregate population of Canada' in sub-s. 4 of s. 51 of the British North America Act, 1867, should be construed as meaning the whole population of Canada, including that of the provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act." And they gave full reasons for their conclusion.

[1905] *A. C.* p. 49.

The case of Prince Edward Island afterwards came before the Court, and in that case the learned judges after argument, and for reasons fully stated by them, answered the question submitted to them in the affirmative.

The appeals now before their Lordships are against these two decisions. The appeal of Prince Edward Island was filed first, and the learned counsel for that province was the first to be heard

before their Lordships. But it will be more convenient to deal with the cases in the order in which they came before the Supreme Court, and to consider that of New Brunswick first.

The scheme of s. 51 is clear and simple. In directing a re-adjustment of representation after each decennial census, it provides that Quebec is to have a fixed number of sixty-five representatives, and that each of the other provinces is to have assigned to it a number of representatives bearing the same proportion to its population as sixty-five bears to that of Quebec. This is the enactment by virtue of which the number of representatives of any province can be increased or diminished, and this is the enactment which furnishes the rule for such a change. Nor is there any dispute that upon the principle so laid down taken by itself the reduction in the number of representatives of New Brunswick was right.

The question arises upon sub-s. 4, a sub-section which introduces a restriction or qualification upon what has gone before, by saying that on any readjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the last preceding readjustment is ascertained to be diminished by one-twentieth part or upwards. And the point is as to the meaning of the words "the aggregate population of Canada." By s. 4 Canada is defined as meaning "unless it is otherwise expressed or implied . . . . Canada as constituted under this Act." Under the scheme of the Act the Dominion was not constituted by the immediate operation of the Act itself. The territory included in the four original provinces was incorporated by proclamation issued under the authority of s. 3. The territory included in the provinces subsequently incorporated was admitted by Orders in Council issued under s. 146. In their Lordships' opinion all these provinces equally form part of Canada as constituted under the Act.

[1905] *A. C.* p. 50.

The contentions raised on behalf of New Brunswick were these: First, it was said that in sub-s. 4 of s. 51 Canada means only the four original provinces. This contention seems to their Lordships inconsistent with s. 4. It was next said that Canada, in sub-s. 4 of s. 51, could at most only apply to such provinces as were in the fullest sense themselves governed by that section, and that by reason of the terms of incorporation already cited, this was not the case with regard to each of the three provinces admitted since the original formation of the Dominion. Whatever be the case with regard to the latter part of this contention, it seems clear that the provinces in question form part of Canada as constituted under the Act.

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Lastly, it was contended that the territories should be excluded in estimating the aggregate population of Canada under sub-s. 4. It is doubtful, however, whether this point properly arises on the question submitted to the Supreme Court. It was not suggested that the exclusion of the territories from the calculation could have affected the result of the readjustment, and the Supreme Court has rightly not dealt with this matter.

For these reasons their Lordships agree with the learned judges of the Supreme Court in the case of New Brunswick.

The case put forward on behalf of Prince Edward Island was somewhat wider in its scope. It was suggested that s. 51 applies only to the distribution of representatives between the four original provinces. But the terms on which Prince Edward Island was incorporated expressly declared that its representation was "to be readjusted from time to time under the provisions of the British North America Act, 1867."

It was further argued that, supposing s. 51 to apply to Prince Edward Island, still it was not liable to have the number of its representatives reduced in 1903 for the following reasons: that by the terms of sub-s. 4 there could be no reduction on any decennial adjustment unless there was a previous readjustment to afford a comparison, so that for any province the first readjustment could not entail a reduction though it might permit of an increase, that there was no readjustment for any province unless its representation was altered, and that therefore, by the combined operation of s. 51 and of the terms on which Prince Edward Island entered the Confederation, its representation could not be reduced unless it had been previously increased.

This argument assumes that there has been no readjustment for any province unless there has been alteration. Their Lordships think this is to give too narrow a meaning to the word. In their opinion, when as the result of a census the representation of the provinces is reconsidered and the necessary changes, if any, made to bring it into harmony with the results of the census, that is a readjustment within the meaning of sub-s. 4, whether there be or be not any change in the case of any particular province. Their Lordships, therefore, think that the answer of the Supreme Court to the question submitted to it was correct.

Their Lordships will humbly advise His Majesty that each of these appeals should be dismissed.

There will be no order as to costs.

Solicitors for Prince Edward Island: *Blake & Redden.*
Solicitors for New Brunswick: *Field, Emery, Roscoe & Medley.*
Solicitors for the Dominion: *Charles Russell & Co.*

TORONTO *v.* BELL TELEPHONE COMPANY [1905], A. C. 52. J. C.* 1904

CORPORATION OF THE CITY OF TORONTO PLAINTIFFS; *July* 21, 22; *Nov.* 11.

AND

BELL TELEPHONE COMPANY OF CANADA. DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

British North America Act, 1867, *ss.* 91, 92, *sub-s.* 10 (*a*)—*Dominion Act* (43 *Vict. c.* 67)—*Ontario Act* (45 *Vict. c.* 71)—*Powers of Dominion Legislature—Local Undertakings extended beyond Provincial Limits.*

Held, that under its Dominion incorporating Act (43 Vict. c. 67) the respondent telephone company was entitled, without the consent of the municipal corporation, to enter upon the streets and highways of the city of Toronto and to construct conduits or lay cables thereunder, or to erect poles with wires affixed thereto upon or along such streets or highways. The scope of the respondents' business contemplated by the said Act and involving its extension beyond the limits of any one province was within the express exception made by s. 92, sub-s. 10 (*a*), of the British North America Act, 1867, from the class of local works and undertakings assigned thereby to provincial legislatures. Accordingly, Act 43 Vict. c. 67 was within the exclusive competence of the Dominion Parliament under s. 91.

Ontario Act 45 Vict. c. 71, passed to authorize the exercise of the above powers within the province, subject to the consent of the corporation, was held to be ultra vires, and could not by reason of having been passed on the application of the respondent company be validated as a legislative bargain.

Appeal from a judgment of the Court of Appeal (Sept. 14, 1903) reversing a judgment of Street, J. (Feb. 26, 1902), on a special case stated in two actions.

The respondents claimed in two actions, one brought by themselves and the other by the appellants, the right under their incorporating Acts, which were passed by the Dominion legislature, to enter upon the streets and highways of the appellants which vested in them under their Municipal Act of the province of Ontario, and to construct conduits or cables thereunder, or to erect poles and affix wires thereto upon or along such streets or highways without the appellants' consent. [1905] *A. C.* p. 53.

When the respondents began business, the question as to their right to carry on a local business was raised in the province of Quebec (*Reg.* v. *Mohr* (1)), and decided adversely to them, whereupon, at

* *Present*:—LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

(1) (1881) 7 Q. L. R. 183; 2 Cartwright, 257.

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their instance, on March 10, 1882, the statute 45 Vict. c. 71, intituled "An Act to confer certain powers upon the Bell Telephone Company of Canada," was enacted by the legislature of Ontario. This Act recites, among other things, "that doubts have arisen as to the powers of the said company under the said Act" (43 Vict. c. 67) "in regard to those portions of its work and undertaking which are local and do not extend beyond the limits of this province," and by s. 2 enacts: "The Bell Telephone Company of Canada may construct erect and maintain its line or lines of telephone along the sides of and across or under any public highways streets bridges watercourses or other such places: Provided the said Company shall not interfere with the public right of travelling on and using such highways streets bridges or watercourses and provided that in cities towns and incorporated villages the Company shall not erect any pole higher than forty feet above the surface of the street nor affix any wire less than twenty-two feet above the surface of the street nor carry any such poles or wires along any street without the consent of the municipal council having jurisdiction over the streets of the said city, town or incorporated village."

On May 17, 1882, the respondents' Dominion incorporating Act (43 Vict. c. 67) was amended by the Dominion statute 45 Vict. c. 95, by inserting the words "the location of the line or lines and" in the 28th line of s. 3 thereof after the word "villages," and by the 4th section of the said amending Act it is provided that "the said Act of incorporation as hereby amended and the works thereunder authorized are hereby declared to be for the general advantage of Canada."

[1905] *A. C.* *p.* 54.

A special case was agreed upon in the said two actions on which the judgment of the Court should proceed.

Street, J., decided in favour of the appellants, and is reported in (1902) 3 Ont. L. R. 470. He held that while the Dominion Act (43 Vict. c. 67) duly incorporated the company, it did not thereby obtain the power of interfering in any province with the property or rights of persons until so authorized by the provincial legislature.

The Court of Appeal, Maclennan, J.A., dissenting, whose judgments are reported in (1903) 6 Ont. L. R. 335, held that the incorporating Act and the amending Act are within clause 10 (*a*) of s. 92 of the British North America Act, and within the exclusive legislative authority of the Parliament of Canada; and that the powers conferred by the Act as amended are not curtailed by the provisions of the Ontario Act as regards the right to construct and maintain telephone lines along the sides of and across or under any highway or street of

the city for the purposes of either their local or long-distance business, subject, however, to the provisions in s. 3 of the incorporating Act as amended.

C. Robinson, K.C., and *Fullerton, K.C.*, for the appellants, contended that the incorporating Acts were not within the exclusive legislative authority of the Dominion Parliament. The principal Act (43 Vict. c. 67) did not declare the works of the company to be for the general advantage of Canada, or for the advantage of two or more of the provinces as provided in sub-s. 10 (*c*) of s. 92 of the British North America Act, 1867. The works would, therefore, come within the exclusive powers assigned to the provinces by s. 92, except in so far as they might be "works or undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the provinces," within sub-s. 10 (*a*) of s. 92. The amending Act (45 Vict. c. 95) declared those works to be for the general advantage of Canada; but it was contended that that applied only to the long-distance business and lines, and in any case did not abrogate the Ontario Act (45 Vict. c. 71), under which the respondents require the assent of the appellants to enable them to carry their lines of telephone (at least for local business) under or along the city streets. They further contended that the respondents, having applied for and obtained the Ontario Act, are subject to its restrictions, if not by force of the enactment, as the result of the legislative agreement evidenced thereby to which the respondents were parties. The respondents' works or undertakings do not come within the exclusive powers of the Dominion Parliament unless and until they actually connect provinces or extend beyond provinces, and then only as to works or undertakings so actually connecting or extending. The Act of 1867 does not exempt from the jurisdiction of the provincial legislatures works which are merely authorized so to connect or extend, but only such works as actually have that practical result. Reference was made to *McArthur* v. *Northern and Pacific Junction Ry. Co.* (1); *Re Grand Junction Ry. Co.* (2); *Reg.* v. *Mohr* (3); *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (4); *Madden* v. *Nelson and Fort Sheppard Railway* (5); *Dow* v. *Black* (6); *Bonn* v. *Bell Telephone Co.* (7); *Bell Telephone Co.* v. *Belleville Electric Light Co.* (8).

[1905] A. C. p. 55.

(1) (1890) 17 O. A. R. 86.
(2) (1880) 45 U. C. Q. B. 302.
(3) 7 Q. L. R. 183; 2 Cartwright, 257.
(4) [1899] A. C. 367, *ante*, p. 558.
(5) [1899] A. C. 626, *ante*, p. 571.
(6) (1875) L. R. 6 P. C. 272.
(7) (1899) 30 Ont. Rep. 696, 702.
(8) (1886) 12 Ont. Rep. 571.

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Blake, K.C., and *Cassels, K.C.*, for the respondents, contended that under the British North America Act the respondent company has been from the time of its incorporation within the exclusive legislative jurisdiction of the Dominion. Its objects and powers must be ascertained by reference to the incorporating Act. A telephone company's operations necessarily comprise, not merely long-distance telephone lines extending beyond the limits of a province, but also shorter lines between various urban centres, so as to enable its customers to communicate at whatever distance, great or small. The powers given by the Act were no more than were absolutely necessary to enable the company's business to be carried on. The objects and powers of the company involved action and operation beyond the boundaries of a single province: see s. 92, sub-s. 10 (*a*). Consequently the Act was within the exclusive powers of the Dominion, irrespective of whether those powers were exercised, or objects attained. The Ontario Act was ultra vires and inoperative. As for a legislative bargain, it was merely passed to allay doubts which the company did not share as to that part of its business which was local within the province. It was a precautionary measure, not an adjustment of conflicting rights. The company's rights are such as are given to them by their incorporating Acts, and cannot be impaired by the Ontario legislature.

[1905] A. C. p. 56.

Robinson, K.C., replied.

The judgment of their Lordships was delivered by

1904 *Nov.* 11.

LORD MACNAGHTEN. This is an appeal from a judgment of the Court of Appeal for Ontario on a special case stated by agreement in two separate actions, in each of which the appellants, the corporation of the city of Toronto, claimed an injunction against the Bell Telephone Company of Canada.

The claim was founded upon the contention that the Telephone Company was not entitled to enter upon the streets and highways of the city and to construct conduits or lay cables thereunder, or to erect poles with wires affixed thereto upon or along such streets or highways without the consent of the corporation.

The company had been incorporated by a Dominion statute of April 29, 1880 (43 Vict. c. 67), for the purpose of carrying on the business of a telephone company. The scope of its business was not confined within the limits of any one province. It was authorized to acquire any lines for the transmission of telephone messages "in Canada or elsewhere," and to construct and maintain its lines along, across, or under any public highways, streets, bridges, watercourses, or other such places, or across or under any navigable waters, "either

wholly in Canada or dividing Canada from any other country," subject to certain conditions and restrictions mentioned in the Act, which are not material for the present purpose.

The British North America Act, 1867, in the distribution of legislative powers between the Dominion Parliament and provincial legislatures, expressly excepts from the class of "local works and undertakings" assigned to provincial legislatures "lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province": sect. 92, sub-s. 10 (*a*). Sect. 91 confers on the Parliament of Canada exclusive legislative authority over all classes of subjects so expressly excepted. It can hardly be disputed that a telephone company the objects of which as defined by its Act of incorporation contemplate extension beyond the limits of one province is just as much within the express exception as a telegraph company with like powers of extension. It would seem to follow that the Bell Telephone Company acquired from the legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and that no provincial legislature was or is competent to interfere with its operations, as authorized by the Parliament of Canada. It appears, however, that shortly after the incorporation of the company doubts arose as to its right to carry on local business. The question was raised in the province of Quebec, and decided adversely to the company in the case of *Reg.* v. *Mohr* (1). In consequence of this decision, with which their Lordships are unable to agree, the company applied for and obtained from the legislature of Ontario an Act of March 10, 1882 (45 Vict. c. 71, Ontario), authorizing it to exercise within that province the powers which the Dominion Act had purported to confer upon it. This Act, however, according to the construction placed upon it by the corporation (which, for the present purpose, their Lordships assume to be correct), makes the consent of the municipal council a condition precedent to the exercise of the company's powers in cities, towns, and incorporated villages.

[1905] A. C. p. 57.

The company was proceeding to construct its lines in the city of Toronto without having obtained the consent of the corporation, when the corporation brought the two actions which resulted in the special case the subject of the present appeal.

[1905] A. C. p. 58.

The case was heard in the first instance by Street, J., who decided in favour of the corporation; but his decision was reversed by the Court of Appeal for Ontario, Maclennan, J.A., dissenting.

(1) 7 Q. L. R. 183; 2 Cartwright, 257.

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The view of Street, J., apparently was that, inasmuch as the Act of incorporation did not expressly require a connection between the different provinces, the exclusive jurisdiction of the Parliament of Canada over the undertaking did not arise on the passing of the Act, and would not arise unless and until such a connection was actually made. In the meantime, in his opinion, the connection was a mere paper one, and nothing could be done under the Dominion Act without the authority of the legislature of the province. This view, however, did not find favour with any of the learned Judges of Appeal. In the words of Moss, C.J.O., "the question of the legislative jurisdiction must be judged of by the terms of the enactment, and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction." If authority be wanted in support of this proposition, it will be found in the case of *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1), to which the learned Judges of Appeal refer.

Maclennan, J.A., differed from the rest of the Court on one point only. He agreed in thinking that it would not be competent for a provincial legislature of itself to limit or interfere with powers conferred by the Parliament of Canada, but he seems to have thought that the Bell Telephone Company by reason of its application to the Ontario legislature was precluded or estopped from disputing the competency of that legislature, and that the enactment making the consent of the corporation a condition precedent amounted to a legislative bargain between the company and the corporation to the effect that the company would not use the powers conferred upon it by the Dominion Parliament without the consent of the corporation.

[1905] A. C. p. 59.

Their Lordships, however, cannot accept this view. They agree with the Chief Justice in thinking that no trace is to be found of any such bargain, and that nothing has occurred to prevent the company from insisting on the powers which the Dominion Act purports to confer upon it.

Their Lordships, therefore, are of opinion that the appeal must fail.

There are two minor points which ought perhaps to be noticed.

(1.) It was argued that the company was formed to carry on, and was carrying on, two separate and distinct businesses—a local business and a long-distance business. And it was contended that the local business and the undertaking of the company so far as it dealt with local business fell within the jurisdiction of the

(1) (1883) 9 App. Cas. 157, *ante*, p. 356.

provincial legislature. But there, again, the facts do not support the contention of the appellants. The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places. The special case contains a description of the company's business which seems to be a complete answer to the ingenious suggestion put forward on behalf of the appellants.

"The company," it says, "carries on a long-distance telephone business and a local telephone business in various places in the Dominion, including the city of Toronto, operated by means of lines of telephone as hereinafter defined. The local business consists of furnishing communication between persons using telephones in a city, town, or other place where a central exchange exists. There are central exchanges to which run both the local and long-distance lines. Any person in Toronto may use the long-distance lines for the purpose of speaking to a person outside of Toronto by going to a central exchange and paying the usual charge therefor, and any telephone subscriber in Toronto desiring to speak to a person outside of Toronto may use the long-distance lines for the purpose of having connection made with them through the central exchange and paying such usual charge. In doing this he would use his own instrument and line to the central exchange and the long-distance line from there. The long-distance lines are not used in the local business.

[1905] *A. C.* *p.* 60.

"A line or lines of telephone consist of poles with wires affixed thereto, or of conduits with wires carried through the same."

(2.) An Act of May 17, 1882 (45 Vict. c. 95), amending the Company's Act of incorporation, and passed by the Dominion legislature immediately after the passing of the Ontario Act, was referred to in the course of the argument. This Act seems to have been intended, partly at any rate, to neutralize the effect of the Ontario Act. It declares the Act of incorporation as thereby amended and the works thereunder authorized "to be for the general advantage of Canada." It is not very easy to see what the part of the section declaring the Act of incorporation to be for the general advantage of Canada means. As regards the works therein referred to, if they had been "wholly situate within the province," the effect would

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have been to give exclusive jurisdiction over them to the Parliament of Canada; but, inasmuch as the works and undertaking of the company authorized by the Act of incorporation were not confined within the limits of the province, this part of the declaration seems to be unmeaning. Then the Act of incorporation was amended by the introduction of words giving the engineer or other officer appointed by the municipal council a voice in "the location of the line" as well as in "the opening up of the street." It was contended that this amendment enabled the council to select the course of the line and to determine the streets through which it might be taken. Their Lordships, however, do not think the words introduced by the amendment can have the effect of enabling the council to refuse the company access to streets through which it may propose to carry its line or lines. They may give the council a voice in determining the position of the poles in streets selected by the company, and possibly in determining whether the line in any particular street is to be carried overhead or underground.

[1905] *A. C. p.* 61.

In the result, their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal (1).

Solicitors for appellants: *Freshfields.*
Solicitors for respondents: *Blake & Redden.*

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J. C.* 1905 *Dec.* 13, 14, 15. 1906 *Feb.* 27.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . . } PLAINTIFF;

AND

CANADIAN PACIFIC RAILWAY COMPANY . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

British North America Act, 1867, *ss.* 91, 92, 108—*Power of the Dominion to legislate for Provincial Crown Property—Dominion Act* (44 *Vict. c.* 1), *s.* 18 (*a*)—*Provincial Foreshore.*

Sect. 108 of the British North America Act, 1867, empowers the Dominion Parliament to legislate for any land, including foreshore, which is proved to form part of a public harbour. Sects. 91 and 92, read together, empower the Dominion to dispose of provincial Crown lands, and therefore of a

* *Present*:—LORD MACNAGHTEN, LORD DAVEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

(1) Ref. *British Columbia* v. *C.P.R. post*, p. 630.

provincial foreshore, for the purposes of the respondent railway, which is a trans-continental railway connecting several provinces:—

Held, that s. 18 (*a*) of the respondents' incorporating Dominion Act (44 Vict. c. 1) is not controlled by the Consolidated Railway Act, 1879, and applies to provincial as well as Dominion Crown lands. Power given thereunder to appropriate the foreshore in question includes a power to obstruct any rights of passage previously existing across it.

Appeal from a judgment (April 15, 1905) of the Full Court, affirming a judgment of Duff, J. (July 30, 1904), which dismissed the appellants' suit, with costs to be paid by the relator, the city of Vancouver.

The action was for a declaration (with appropriate relief) that the public have a right of access to the sea via Cambie Abbott and Carral Streets in the city of Vancouver, notwithstanding that the foreshore at the ends of those streets is occupied by wharves, yards, line of railway, &c., built by the respondent company. The respondents justified the construction of their works under powers conferred upon them by the Parliament of Canada, and the question decided in the appeal was whether that Parliament had jurisdiction to grant such powers under the circumstances stated in their Lordships' judgment.

[1906] *A. C.* *p.* 205.

The Dominion Government had issued a Crown grant to the respondents of lands required by them under s. 18 (*a*) of their incorporating Act (44 Vict. c. 1, Canada), including all the foreshore at the street ends above mentioned and a portion of the bed of the harbour below low-water mark. The trial judge found that the company's works thereon, which constituted the obstruction complained of, were necessary to meet the reasonable requirements of the company. He held that the property in the harbour including the lands in question passed to the Dominion under s. 108 of the British North America Act, 1867; that the company's Act of incorporation authorized the construction and user of the works for the purposes of the railway; and that as such user required the exclusive occupation of the locus in which they were placed the public rights referred to, if not extinguished, were suspended during the period of user for such purposes.

On appeal, the Full Court affirmed this judgment, and further held that in any event the Dominion Parliament had legislative jurisdiction, when legislating in respect to Dominion railways, over provincial lands and the rights of the public over streets, and therefore had power to pass s. 18 (*a*) above referred to, even if the foreshore and lands under the sea taken under that section were owned by the province. If this were not so in the case of ordinary Dominion

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railways, it would be so in the case of the railway built by the respondent company, which was built as a fulfilment by the Dominion Government of its obligations under the 11th clause of the terms of union between British Columbia and Canada.

C. Wilson (Attorney-General of British Columbia), *C.A. Russell, K.C.*, and *Simon*, for the appellant, contended that it was not within the jurisdiction of the Dominion Parliament to authorize the appropriation of the said streets, street ends, and foreshore for the purposes of the railway in question. The powers purporting to have been conferred on the respondents are to be found in ss. 17 and 18 of the charter of incorporation scheduled to a contract which is appended to and approved and ratified by the incorporating Act (44 Vict. c. 1): see also 50 Vict. (Canada) c. 56, s. 5. They render applicable the provisions of the Dominion Consolidated Railway Act, 1879 (42 Vict. c. 9), with certain modifications, and s. 15 of that Act did not justify what has been done in this case. Moreover, s. 18 (*a*) of 44 Vict. c. 1 on its true construction did not apply to provincial Crown lands, but was limited exclusively to Dominion Crown property. Upon the question of the legislative authority of the Dominion to authorize the appropriation in question, reference was made to the British North America Act, 1867, s. 108 and ss. 91 and 92, and it was contended that these provisions should not be so construed as to authorize the appropriation of provincial Crown lands. Reference was made to *North Shore Ry. Co.* v. *Pion* (1); *Attorney-General for Canada* v. *Attorneys-General for Ontario, &c.* (2); *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (3); *Ontario Mining Co.* v. *Seybold* (4); *Toronto Corporation* v. *Bell Telephone Co. of Canada* (5).

[1906] A. C. p. 206.

Sir R. Finlay, K.C., E. P. Davis, K.C., and *Rowlatt*, for the respondents, contended that the construction of the works in question was authorized by 44 Vict. c. 1, and the location thereof was confirmed and ratified by 50 Vict. c. 56. The foreshore was part of a public harbour both at the date of the incorporating Act and of the admission of British Columbia into the Dominion; and the property and legislative jurisdiction over it was in the Dominion. By the 11th clause of the terms of union the Canadian Government undertook to secure the completion of a trans-continental railway running from the Atlantic to the Pacific. Under ss. 91 and 108 of the British North America Act the Dominion had power to extinguish any public rights over the foreshore or bed of a public harbour. And it had power to authorize

(1) (1889) 14 App. Cas. 612.
(2) [1898] A. C. 700, 711, 712, *ante*, p. 542.
(3) [1899] A. C. 367, *ante*, p. 558.
(4) [1903] A. C. 73, 79, *ante*, p. 584.
(5) [1905] A. C. 52, *ante*, p. 617.

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the works in question by virtue of its general power to legislate in respect of Dominion railways: (see s. 91, sub-ss. 1, 10, 29, s. 92, sub-s. 10) and in particular by virtue of the Imperial Order in Council of May 16, 1871, passed under s. 146 of the Act of 1867, and providing for the construction of a trans-continental railway. Reference was made to *Attorney-General for Canada* v. *Attorneys-General for Ontario, &c.* (1), as to public harbours. See also *Corporation of Yarmouth* v. *Simmons* (2).

Wilson, K.C., replied.

[1906] A. C. *p.* 207.

The judgment of their Lordships was delivered by

1906 *Feb.* 27.

Sir Arthur Wilson. This is an appeal from a judgment, dated April 15, 1905, of the Full Court of the Supreme Court of British Columbia, which affirmed a previous judgment of a single judge of the same Court.

The suit out of which the appeal arises is of the nature of an information by the Attorney-General of British Columbia, on the relation of the city of Vancouver, against the Canadian Pacific Railway Company. The statement of claim alleged that the public was entitled to certain rights of way over the foreshore of the sea in the city of Vancouver, and that the defendants had so constructed their railway and works upon the foreshore as to obstruct those public rights of way; and it asked for a declaration of the rights of the public and for consequential relief.

The defendant company denied the existence of the alleged public rights of way. They justified what they had done by virtue of their statutory powers; and they raised another defence based upon a by-law of the city of Vancouver. This last defence their Lordships think it unnecessary to notice further.

The facts necessary for the decision of the present case may be very briefly stated.

In 1871 British Columbia entered the Canadian Confederation, the construction of an inter-colonial railway being one of the terms of the union. The present railway company was incorporated in 1881 by the Canadian Pacific Railway Act of the Dominion Parliament (44 Vict. c. 1) for the purpose of constructing and working the inter-colonial railway whose name is embodied in the title to the Act. The railway was first constructed as far as Port Moody, but was afterwards extended some miles further west to the city of Vancouver. The arrangement for this extension appears to have been entered into in 1885.

[1906] A. C. *p.* 208.

(1) [1898] A. C. 711, *ante*, p. 542. (2) (1878) 10 Ch. D. 518, 526.

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The city of Vancouver lies along the southern bank of an inlet of the sea known as Burrard's Inlet. It was incorporated as a city in 1886; but some years before that date, apparently in 1870, a portion of what is now the city was laid out (on paper at all events) as the old Granville Townsite. The plans of that townsite, or intended site, shewed blocks of land above, on, and below the foreshore. They shewed three streets, Carral Street, Abbott Street, and Cambie Street, parallel to one another running from south to north, that is to say, from the landward to the coast line. The alleged public rights of way the interruption of which is now complained of were in continuation of those streets, across the foreshore down to low-water mark.

The learned judge who tried the case found that the rights of way contended for did exist both at the time when British Columbia joined the Confederation and at the time when the railway company by the construction of its works interrupted the free access to the sea. The learned judges of the Full Court did not dissent from this finding, rightly addressing their minds to the more important general questions arising in the case. Their Lordships propose to follow a similar course. Grave difficulties were pointed out in the course of the argument in the way of upholding the validity of the rights of way. But as the appeal can be disposed of upon broader grounds their Lordships do not think it necessary to enter upon this minor inquiry; and they assume for the purpose of this judgment that the public rights of way existed as found.

That those rights of way have been interrupted is not open to question, for the railway and its adjuncts have been carried along the coast both above and below low-water mark. Prior to the time when British Columbia entered the Confederation in 1871, the foreshore in question was Crown property of the Colony, now the Province, of British Columbia.

The railway company justifies what it has done under s. 18 (*a*) of the Act of the Dominion Parliament which incorporated it (44 Vict. c. 1), which says:—

"The company shall have the right to take, use, and hold the beach and land below high-water mark in any stream, lake, navigable water, gulf or sea in so far as the same shall be vested in the Crown and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways."

[1906] A. C. p. 209.

The map or plan required by the last words of the section was duly deposited.

The right of the Dominion Parliament so to legislate with respect

to provincial Crown lands situated as these are was based in argument upon two distinct grounds.

The first ground was this: Sect. 108, with the Third Schedule of the British North America Act, 1867 (Imperial Act 30 & 31 Vict. c. 3), includes public harbours amongst the property in each province which is to be the property of Canada. This certainly empowers the Dominion Parliament to legislate for any land which forms part of a public harbour.

In a case heard by this Board, *Attorney-General for the Dominion of Canada* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia* (1), it was laid down that—

"It does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it is equally clear that it did not form part of it."

In accordance with that ruling the question whether the foreshore at the place in question formed part of the harbour was in the present case tried as a question of fact, and evidence was given bearing upon it directed to shew that before 1871, when British Columbia joined the Dominion, the foreshore at the point to which the action relates was used for harbour purposes, such as the landing of goods and the like. That evidence was somewhat scanty, but it was perhaps as good as could reasonably be expected with respect to a time so far back, and a time when the harbour was in so early a stage of its commercial development. The evidence satisfied the learned trial judge, and the Full Court agreed with him. Their Lordships see no reason to dissent from the conclusion thus arrived at. And on this ground, if there were no other, the power of the Dominion Parliament to legislate for this foreshore would be clearly established.

[1906] A. C. p. 210.

The second contention in support of the right of the Dominion Parliament to legislate for the foreshore in question is rested upon s. 91, read with s. 92, of the British North America Act, which secures to the Dominion Parliament exclusive legislative authority in respect of lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting any province with any other or others of the provinces, or extending beyond the limits of the province, a description which clearly applies to the Canadian Pacific Railway.

It was argued for the appellant that these enactments ought not

(1) [1898] A. C. 700, *ante*, p. 553.

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to be so construed as to enable the Dominion Parliament to dispose of provincial Crown lands for the purposes mentioned. But their Lordships cannot concur in that argument. In *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1) (a case relating to the same company as the present) the right to legislate for the railway in all the provinces through which it passes was fully recognized. In *Toronto Corporation* v. *Bell Telephone Co. of Canada* (2), which related to a telephone company whose operations were not limited to one province, and which depended on the same sections, this Board gave full effect to legislation of the Dominion Parliament over the streets of Toronto which are vested in the city corporation. To construe the sections now in such a manner as to exclude the power of Parliament over provincial Crown lands would, in their Lordships' opinion, be inconsistent with the terms of the sections which they have to construe, with the whole scope and purpose of the legislation, and with the principle acted upon in the previous decisions of this Board. Their Lordships think, therefore, that the Dominion Parliament had full power, if it thought fit, to authorize the use of provincial Crown lands by the company for the purposes of this railway.

[1906] *A. C.* *p.* 211.

It was contended, however, for the appellant that, assuming the competence of the Dominion Parliament to legislate with respect to provincial Crown lands, such as those now in question, it has not in fact done so, for it was said that s. 18 (*a*) of the Canadian Pacific Railway Act, when it authorized the company to take the foreshore of the sea "in so far as the same shall be vested in the Crown," should be construed as limited to Dominion Crown property. The argument was rested mainly upon the words in the same section "in so far as the same shall not be required by the Crown," and upon the words at the end of the section requiring the deposit of a map or plan in the office of the Minister of Railways.

It was argued that no protection is here provided for provincial interests and that therefore the section should not be held to apply to provincial lands. But with regard to the exception of lands required by the Crown, their Lordships think that they apply to provincial requirements no less than to those of the Dominion. The final words of the section are mere matters of procedure; and in prescribing the procedure the Legislature must be taken to have assumed that all necessary communications between the Dominion Governments and the provincial Governments would always take place. This argument therefore fails, in their Lordships' opinion.

It was next contended that s. 18 (*a*) of the Canadian Pacific

(1) [1899] A. C. 367, *ante*, p. 563. (2) [1905] A. C. 52, *ante*, p. 624.

Railway Act, assuming it to apply to such provincial Crown lands as those in question, did not authorize the closing of public highways.

It was pointed out that that Act incorporated the Consolidated Railway Act, 1879, in so far as its provisions were not inconsistent with, or contrary to the provisions of, the incorporating Act, and that s. 15 of the Consolidated Railway Act contains a variety of provisions relating to the interference with highways by railway companies which, if applicable, would be inconsistent, it is said, with what the respondent company has done. It is unnecessary to inquire whether the provisions referred to would or would not apply to such rights of way as those now in question. It is enough to say that the language of the Canadian Pacific Railway Act must prevail over that of the Consolidated Railway Act which applies only so far as it is not inconsistent with the special Act. And it is clear, in their Lordships' opinion, that the power given to the company to appropriate the foreshore for the purposes of their railway of necessity includes the right to obstruct any rights of passage previously existing across that foreshore.

[1906] A. C. p. 212.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

Solicitors for appellant: *Gard, Rook & Winterbotham.*

Solicitors for respondent company: *Blake & Redden.*

CANADA *v.* CAIN [1906], A. C. 542.

J. C.* 1906 *July* 6, 27.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } Appellant;

AND

EVERETT E. CAIN . . . . . Respondent.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } Appellant;

AND

GILHULA . . . . . Respondent.

ON APPEAL FROM THE HIGH COURT (KING'S BENCH) OF ONTARIO.

CONSOLIDATED APPEALS.

Power of Dominion Parliament—Validity of Dominion Act 60 *&* 61 *Vict. c.* 11, *s.* 6, *amended by* 1 *Edw.* 7, *c.* 13—*Power to expel and deport Aliens.*

Held, that s. 6 of the Dominion statute 60 & 61 Vict. c. 11, as amended by 1 Edw. 7, c. 13, s. 13, is intra vires of the Dominion Parliament.

* *Present*:—Lord Macnaghten, Lord Dunedin, Lord Atkinson, Sir Arthur Wilson, and Sir Henri Elzéar Taschereau.

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The Crown undoubtedly possessed the power to expel an alien from the Dominion of Canada, or to deport him to the country whence he entered it. The above Act, assented to by the Crown, delegated that power to the Dominion Government, which includes and authorizes them to impose such extra-territorial constraint as is necessary to execute the power.

Appeal from orders made by Anglin, J., on June 17, 1905, discharging the respondents from custody. The question decided was whether s. 6 of Dominion Act 60 & 61 Vict. c. 11, as amended by 61 Vict. c. 2 and 1 Edw. 7, c. 13, is ultra or intra vires of the Dominion Parliament.

On May 23, 1905, the appellant issued two warrants under these Acts to take the respondents, then residing in the province of Ontario, and return them to the United States of America. On being arrested the respondents were discharged on a writ of habeas corpus solely on the ground that the above Acts were ultra vires. Anglin, J., held that the Parliament of Canada had no power to pass s. 6 of the Act in question. His view was that the use of the words "returned to" in s. 6 implied the exercise of constraining force outside the territorial limits of Canada, and that no colonial Legislature had power to enact legislation to be actively enforced beyond the boundaries of the Colony; and accordingly he held that s. 6 was ultra vires.

Newcombe, K.C., and *Shepley, K.C.*, for the appellant, contended that the statutes in question were intra vires of the Dominion Parliament, as being laws for the peace, order, and good government of Canada. They were enacted in the execution of that Parliament's enumerated powers with regard to—(*a*) the regulation of trade and commerce, (*b*) naturalization and aliens: see British North America Act, 1867, s. 91; and also 28 & 29 Vict. c. 63. Reference was made to *Riel* v. *Reg.* (1); *Hodge* v. *Reg.* (2); *In re Criminal Code Sections relating to Bigamy* (3); *Reg.* v. *Brierly* (4).

J. A. Robinson and *Duncan*, for the respondents, contended that the Court below was right in holding the statutes to be ultra vires for the reasons assigned, viz., that they involved an assumption of extra-territorial jurisdiction. The constraining force of the officer acting under the Attorney-General's warrant cannot cease the moment the respondents are outside the Dominion, for they are directed to be "returned to" the United States, which involves, or may involve, the application of force outside the Dominion.

[1906] *A. C. p.* 544.

(1) (1885) 10 App. Cas. 675, 678.
(2) (1883) 9 App. Cas. 117, *ante*, p. 333.
(3) (1897) 27 Sup. Ct. Can. Rep. 461, 481, 483.
(4) (1887) 14 Ont. Rep. 525, 531, 533.

The judgment of their Lordships was delivered by

LORD ATKINSON. The question for decision in this case is whether s. 6 of the Dominion statute 60 & 61 Vict. c. 11 (styled in the respondents' case "The Alien Labour Act"), as amended by 1 Edw. 7, c. 13, s. 13, is or is not ultra vires of the Dominion Legislature.

In the events which have happened the question has in this instance become more or less an academic one, inasmuch as the two persons arrested under the Attorney-General's warrant granted under the authority of s. 6 were on June 17, 1905, discharged from custody by order of Anglin, J., and, a year having therefore elapsed since the date of their entry into Canada, they cannot be re-arrested.

Sect. 9 of 60 & 61 Vict. c. 11 has been amended by 61 Vict. c. 2, and ss. 1, 6 and 9 of the Alien Labour Act, as amended, are in the terms following:

"(1.) From and after the passing of this Act it shall be unlawful for any person, company, partnership or corporation, in any manner to prepay the transportation, or in any way to assist or encourage the importation or immigration of any alien or foreigner into Canada, under contract or agreement, parole or special, express or implied, made previous to the importation of such alien or foreigner, to perform labour or service of any kind in Canada."

"(6.) The Attorney-General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person, partnership, company, or corporation violating s. 1 of this Act." [1906] *A. C.* *p.* 545.

"(9.) This Act shall apply only to the importation or immigration of such persons as reside in or are citizens of such foreign countries as have enacted and retained in force, or as enact and retain in force, laws or ordinances applying to Canada, of a character similar to this Act."

The validity of s. 6 was impeached on several grounds, and was held to transcend the powers of the Dominion Parliament, inasmuch as it purported to authorize the Attorney-General or his delegate to deprive persons against whom it was to be enforced of their liberty without the territorial limits of Canada, and upon this point alone the decision of the case turned. It was conceded in argument before their Lordships, on the principle of law laid down by this Board in

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the case of *MacLeod* v. *Attorney-General for New South Wales* (1), that the statute must, if possible, be construed as merely intending to authorize the deportation of the alien across the seas to the country whence he came if he was imported into Canada by sea, or if he entered from an adjoining country, to authorize his expulsion from Canada across the Canadian frontier into that adjoining country. The judgment of the learned judge was, in effect, based upon the practical impossibility of expelling an alien from Canada into an adjoining country without such an exercise of extra-territorial constraint of his person by the Canadian officer as the Dominion Parliament could not authorize. No special significance was attached to the word "return." The reasoning of the judgment would apply with equal force if the word used had been "expel" or "deport" instead of "return."

In 1763 Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any time been held or acquired by the Crown of France, were ceded to Great Britain: *St. Catherine's Milling and Lumber Co.* v. *Reg.* (2). Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and, save so far as it has since parted with these powers by legislation, royal proclamation, or voluntary grant, it is still possessed of them. One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, Law of Nations, book 1, s. 231; book 2, s. 125. The Imperial Government might delegate those powers to the governor or the Government of one of the Colonies, either by royal proclamation which has the force of a statute—*Campbell* v. *Hall* (3)—or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them. The following cases establish these propositions: *In re Adam* (4); *Donegani* v. *Donegani* (5); *Cameron* v. *Kyte* (6); *Jephson* v. *Riera* (7). But as it is conceded that by the law

[1906] *A. C.* *p.* 546.

(1) [1891] A. C. 455, at p. 459.
(2) (1888) 14 App. Cas. 46, *ante*, p. 398.
(3) (1774) 1 Cowper, 204.
(4) (1837) 1 Moo. P. C. 460, at pp. 472–6.
(5) (1835) 3 Knapp, 63, at p. 88.
(6) (1835) 3 Knapp, 332, at p. 343.
(7) (1835) 3 Knapp, 130.

of nations the supreme power in every State has the right to make laws for the exclusion or expulsion of aliens, and to enforce those laws, it necessarily follows that the State has the power to do those things which must be done in the very act of expulsion, if the right to expel is to be exercised effectively at all, notwithstanding the fact that constraint upon the person of the alien outside the boundaries of the State or the commission of a trespass by the State officer on the territories of its neighbour in the manner pointed out by Anglin, J., in his judgment should thereby result. Accordingly it was in *In re Adam* (1) definitely decided that the Crown had power to remove a foreigner by force from the island of Mauritius, though, of course, the removal in that case would necessarily involve an imprisonment of the alien outside British territory, in the ship on board of which he would be put while it traversed the high seas.

The question, therefore, for decision in this case resolves itself into this: Has the Act 60 & 61 Vict. c. 11, assented to by the Crown, clothed the Dominion Government with the power the Crown itself theretofore undoubtedly possessed to expel an alien from the Dominion, or to deport him to the country whence he entered the Dominion? If it has, then the fact that extra-territorial constraint must necessarily be exercised in effecting the expulsion cannot invalidate the warrant directing expulsion issued under the provisions of the statute which authorizes the expulsion.

[1906] A. C. p. 547.

It has already been decided in *Musgrove* v. *Chun Teeong Toy* (2) that the Government of the Colony of Victoria, by virtue of the powers with which it was invested to make laws for the peace, order, and good government of the Colony, had authority to pass a law preventing aliens from entering the Colony of Victoria. On the authority of this case s. 1 of the above-mentioned statute would be intra vires of the Dominion Parliament. The enforcement of the provisions of this section no doubt would not involve extra-territorial constraint, but it would involve the exercise of sovereign powers closely allied to the power of expulsion and based on the same principles. The power of expulsion is in truth but the complement of the power of exclusion. If entry be prohibited it would seem to follow that the Government which has the power to exclude should have the power to expel the alien who enters in opposition to its laws. In *Hodge* v. *Reg.* (3) it was decided that a colonial Legislature has within the limits prescribed by the statute which created it "an authority as plenary and as ample . . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow." If,

(1) (1837) 1 Moo. P. C. 460, at pp. 472–6.

(2) [1891] A. C. 272.

(3) 9 App. Cas. 117, *ante*, p. 346.

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therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the Government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose had the statute never been passed.

Their Lordships therefore think that the decision of Anglin, J., was wrong, and that the appeal should be allowed, and will so humbly advise His Majesty.

Having regard to the arrangement as to costs made with the Attorney-General at the hearing of the petition for special leave to appeal, and to all the circumstances of the case, their Lordships direct the appellant to pay the costs of the respondents as between solicitor and client.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondents: *Blake & Redden.*

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July 13, 17; *Nov.* 5.

GRAND TRUNK RLY. *v.* CANADA [1907], A. C. 65.

GRAND TRUNK RAILWAY COMPANY OF CANADA . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL OF CANADA . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Statute 4 *Edw.* 7, *c.* 31—*Power of Dominion Parliament—B. N. A. Act*, 1867, *s.* 92, *sub-s.* 13.

Held, that the Dominion Parliament is competent to enact s. 1 of Canadian statute 4 Edw. 7, c. 31, which prohibits "contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants.

[1907] *A. C. p.* 66.

That section is intra vires the Dominion as being a law ancillary to through railway legislation, notwithstanding that it affects civil rights which, under the British North America Act, 1867, s. 92, sub-s. 13, are the subject of provincial legislation.

Appeal from a judgment of the Supreme Court given on May 15, 1905, in the matter of a reference by His Excellency the Governor-General in Council as to the competency of the

[r] *Present:*—LORD MACNAGHTEN, LORD DUNEDIN, LORD ATKINSON, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

Dominion Parliament to enact the provisions contained in s. 1 of 4 Edw. 7, c. 31, being "an Act to amend the Railway Act, 1903."

This Act dealt solely with railway companies within the jurisdiction or legislative power or control of Parliament. The provisions in question are to the effect stated in their Lordships' judgment.

The Supreme Court (Nesbitt, J., dissenting) held that the section was within the competency of the Dominion Parliament, Nesbitt, J., holding that the Act was ultra vires as one passed to interfere with contract rights, and that it had no real relation to the operation and management of railways.

Lafleur, K.C., contended that the Act was ultra vires, since the exclusive jurisdiction to enact laws in respect to "property and civil rights" is vested in the provincial Legislatures: see British North America Act, 1867, s. 91 and s. 92, sub-s. 13. The enactment in question is in no sense railway legislation, but assumes to regulate and control the power to enter into contracts covered by s. 92, sub-s. 13. It affects railways and their employees no doubt, but it does so in reference to matters exclusively within the ambit of provincial legislation. The mere fact that a company is incorporated by the Dominion does not empower the Dominion Parliament to trench upon provincial rights. He referred to s. 94 of the Act of 1867; *Cushing* v. *Dupuy* (1); *Tennant* v. *Union Bank of Canada* (2); *Attorney-General of Ontario* v. *Attorney-General for Canada* (3); *Hodge* v. *The Queen* (4); *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (5).

Sir E. Carson, K.C., and *Newcombe, K.C.*, for the respondent, contended that the subject of the Act in question was within the legislative authority of the Dominion Parliament: see s. 91, sub-s. 29, and s. 92 of the Act of 1867. That Parliament has the exclusive power of authorizing such railways as those in question, and has necessarily the power of prescribing the conditions on which the companies authorized to construct or operate them shall exercise the rights conferred on them. That Parliament has legislated for the purpose of relieving companies subject to its legislative authority of liability, and can equally legislate to impose liability. If the province has also the same power its legislation may be, and has been, superseded. They referred to s. 239 of the

[1907] A. C. *p.* 67.

(1) (1880) 5 App. Cas. 409, *ante*, p. 253.
(2) [1894] A. C. 31, *ante*, p. 433.
(3) [1894] A. C. 189, *ante*, p. 447.
(4) (1885) 9 App. Cas. 117, *ante*, p. 333.
(5) [1899] A. C. 367, *ante*, p. 558.

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general Railway Act; *Cushing* v. *Dupuy* (1); *Tennant* v. *Union Bank of Canada* (2).

Lafleur, K.C., replied.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The question in this appeal is as to the competency of the Dominion Parliament to enact the provisions contained in s. 1 of 4 Edw. 7, c. 31, of the Statutes of Canada. These provisions may be generally described as a prohibition against any "contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants.

It is not disputed that, in the partition of duties effected by the British North America Act, 1867, between the provincial and the Dominion Legislatures, the making of laws for through railways is entrusted to the Dominion.

The point, therefore, comes to be within a very narrow compass. The respondent maintains, and the Supreme Court has upheld his contention, that this is truly railway legislation. The appellants maintain that, under the guise of railway legislation, it is truly legislation as to civil rights, and, as such, under s. 92, sub-s. 13, of the British North America Act, appropriate to the province.

[1907] *A. C. p.* 68.

The construction of the provisions of the British North America Act has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894—viz., *Attorney-General of Ontario* v. *Attorney-General of Canada* (3) and *Tennant* v. *Union Bank of Canada* (2)—seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail (4).

Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation.

It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature —which is admitted—it cannot be considered out of the way

(1) 5 App. Cas. 409. *ante*, p. 253.
(2) [1894] A. C. 31, *ante*, p. 445.
(3) [1894] A. C. 189, *ante*, p. 456.
(4) Fol. *Toronto* v. *C.P.R. post*, p. 657. *Crown Grain* v. *Day, post*, p. 661.

that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all intra familiam, than in the numerous cases which may be figured where the civil rights of outsiders may be affected. As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers.

In the factum of the appellants it is (inter alia) set forth that the law in question might "Prove very injurious to the proper maintenance and operation of the railway. It would tend to negligence on the part of employees, and other results of an injurious character to the public service and the safety of the travelling public would necessarily result from such a far-reaching statute."

This argument is really conclusive against the appellants. Of the merits of the policy their Lordships cannot be judges. But if the appellants' factum properly describes its scope, then it is indeed plain that it is properly ancillary to through railway legislation. [1907] A. C. p. 69.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal. There will be no order as to costs.

Solicitors for appellants: *Batten, Proffitt & Scott.*
Solicitors for respondent: *Charles Russell & Co.*

RICHELIEU AND ONTARIO *v.* CAPE BRETON [1907], A. C. 112.

J. C.* 1906 *Nov.* 21, 22; *Dec.* 14.

RICHELIEU AND ONTARIO NAVIGATION COMPANY (OWNERS OF S.S. "CANADA"). } APPELLANTS;

AND

OWNERS OF S.S. "CAPE BRETON" . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Supreme and Exchequer Courts Act, 1875, *s.* 47—*Colonial Courts of Admiralty Act*, 1890, *s.* 6—*Judgment of Supreme Court exercising Admiralty Jurisdiction—Special Leave to Appeal unnecessary.*

Notwithstanding the provisions of the Canadian Supreme and Exchequer Courts Act, 1875, s. 47, with respect to the finality of the judgments of

* *Present*:—LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD ATKINSON, and SIR J. GORELL BARNES. *Nautical Assessors*: ADMIRAL RODNEY M. LLOYD, C.B., and CAPTAIN W. F. CABORNE, C.B., R.N.R.

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the Supreme Court, an appeal lies as of right under s. 6 of the Colonial Courts of Admiralty Act, 1890, from a judgment of the said Court when pronounced in an appeal thereto from a decree of the Colonial Court of Admiralty constituted in pursuance of and exercising jurisdiction under the said Act.

Appeal from a judgment of the Supreme Court (October 3, 1905), wherein they declared the appellants' steamship *Canada* to be solely to blame for a collision between her and the *Cape Breton* in the St. Lawrence river on June 12, 1904, and to that extent varied the judgment of the local judge in Admiralty (Exchequer Court of Canada, Quebec Admiralty District) dated November 19, 1904, declaring both steamships to be to blame for the said collision.

[1907] A. C. p. 113.

It was admitted before their Lordships that the *Canada* was to blame, and the question decided was whether the *Cape Breton* was also to blame. The respondents, however, took the preliminary objection that, as the appellants had not obtained special leave to appeal, the judgment was under s. 47 of the Canadian Supreme and Exchequer Courts Act, 1875 (R. S. C. c. 135, s. 71), final and conclusive.

Butler Aspinall, K.C., *Meredith, K.C.*, and *Balloch*, for the respondents, referred to 3 & 4 Will. 4, c. 41, s. 2; 26 & 27 Vict. c. 24, s. 22, and its amending Act (30 & 31 Vict. c. 45), as giving and recognizing appeals to the Crown from Vice-Admiralty Courts. In 1890 all provisions as to Vice-Admiralty appeals were repealed and a new Code established: see the Colonial Courts of Admiralty Act, 1890, s. 14. The old Admiralty Courts being gone, the Acts giving a right of appeal no longer applied, and the Act of 1875 makes the judgments of the Supreme Court final. Reference was made to *The Peerless* (1).

Pickford, K.C., and *Bailhache*, for the appellants, referred to the Act of 1890, s. 6, sub-s. 1, and s. 15.

The judgment of their Lordships was delivered by

1906 *Dec.* 14.

SIR J. GORELL BARNES. In this case the appellants, the owners of the steamship *Canada*, appeal from a judgment of the Supreme Court of Canada dated October 3, 1905, allowing an appeal from a judgment or decree of the judge in Admiralty of the Exchequer Court of Canada, Quebec Admiralty District, pronounced on November 19, 1904, and ordering and adjudging

(1) (1860) Lush. 30.

that the said judgment should be reversed and set aside, and that the steamship *Canada* was alone to blame for a collision between the respondents' steamship *Cape Breton* and the said steamship *Canada* in the river St. Lawrence a short distance below the town of Sorel, on June 12, 1904, at about 2.35 A.M., and that the steamship *Cape Breton* and her owners were entitled to recover from the appellants, and condemning the appellants to pay to the steamship *Cape Breton* and her owners the damages arising out of the said collision, and that the action should be remitted to the said Exchequer Court of Canada for the assessment of such damages, and that the appellants should pay the costs below and in the Supreme Court. The aforesaid judgment or decree of the local judge in Admiralty of the Exchequer Court, Admiralty District of Quebec (the Honourable Adolphe Basile Routhier) pronounced both vessels to blame for the said collision, and decreed accordingly, and in this appeal the appellants contend that the judgment of the Supreme Court of Canada should be reversed and the judgment of the judge in Admiralty restored, while the respondents contend that the appeal should be dismissed.

[1907] A. C. p. 114.

A preliminary point was raised by the respondents that, as the appellants had not applied for nor obtained the leave of His Majesty to bring this appeal, the judgment of the Supreme Court of Canada is final and conclusive by virtue of the provisions of the Canadian Act, the Supreme and Exchequer Courts Act, 1875 (38 Vict. c. 2, s. 47), which provides that "The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard: Saving any right which Her Majesty may be graciously pleased to exercise by virtue of her Royal Prerogative."

But the answer made to this preliminary point by the appellants was that, notwithstanding the provisions of the Act aforesaid, an appeal lies by virtue of the provisions of the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), which amended the law respecting the exercise of Admiralty jurisdiction in Her Majesty's dominions and elsewhere out of the United Kingdom.

Sect. 2 of the last-mentioned Act provided for the establishment and jurisdiction of Colonial Courts of Admiralty.

Sect. 3 gave power to the Legislature of a British possession by Colonial law to declare any Court of limited civil jurisdiction,

J. C. 1906

RICHELIEU AND ONTARIO NAVIGATION COMPANY v. OWNERS OF S.S. "CAPE BRETON."

[1907] A. C. p. 115.

whether original or appellate, in that possession to be a Colonial Court of Admiralty, and to provide for the exercise by such Court of its jurisdiction under the said Act, and to limit, territorially or otherwise, the extent of such jurisdiction. In pursuance of this section the Canadian Act of 1891 (54 & 55 Vict. c. 29, s. 3) declared the Exchequer Court of Canada to be, within Canada, a Colonial Court of Admiralty, and provided for the exercise by such Court of the jurisdiction, powers, and authority conferred by the said Act of 1890 and by that Act; and s. 6 provided for the appointment of local judges in Admiralty and (s. 9) for the exercise by them of Admiralty jurisdiction and the powers and authority relating thereto within their respective districts, and s. 14, sub-s. 2, gave an appeal direct to the Supreme Court of Canada from any final judgment, decree, or order of a local judge subject to the provisions of the Exchequer Court Act regarding appeals.

Sect. 5 of the Act of 1890 provides that, "Subject to rules of Court under this Act, judgments of a Court in a British possession given or made in the exercise of the jurisdiction conferred on it by this Act shall be subject to the like local appeal, if any, as judgments of the Court in the exercise of its ordinary civil jurisdiction, and the Court having cognizance of such appeal shall for the purpose thereof possess all the jurisdiction by this Act conferred upon a Colonial Court of Admiralty."

Sect. 6, sub-s. 1, of the Act of 1890 provides that, "The appeal from a judgment of any Court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is, as of right, no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council"; and by s. 15 the expression "local appeal" means "an appeal to any Court inferior to Her Majesty in Council."

Their Lordships are of opinion that the express provisions of the said 6th section of the Act of 1890 conferred the right of appeal to His Majesty in Council from a judgment or decree of the Supreme Court of Canada pronounced in an appeal to that Court from the judgment or decree of the Colonial Court of Admiralty for Canada constituted under the Acts aforesaid given or made in the exercise of the jurisdiction conferred upon it by the said Act of 1890. Their Lordships therefore permitted the appeal to proceed upon the merits, and the case was accordingly heard.

The case arose out of the collision already referred to, and on June 21, 1904, the owners of the *Canada* brought their action

against the *Cape Breton* in the Exchequer Court of Canada, Quebec Admiralty District, to recover for the damages which they had sustained by the collision. In that action the defendants counter-claimed for the damages which they had sustained in the collision. The case was heard before the local judge already mentioned, and in November, 1904, he delivered an elaborate judgment and pronounced his decree aforesaid, holding both vessels to blame for the collision. From this judgment the defendants (respondents) appealed to the Supreme Court of Canada. The appeal was heard by Sir Elzéar Taschereau, C.J., and Sedgewick, Girouard, Nesbitt, and Idington, JJ., and the Court (Girouard, J., dissenting) held that the *Canada* was alone to blame.

The appellants on the present appeal admitted that the *Canada* was to blame, and the sole question to be determined on this appeal is whether the *Canada* was solely to blame or whether both vessels were to blame.

The evidence in the case is extremely voluminous, the witnesses on both sides having been examined and cross-examined at extraordinary length; but the facts of the case are very simple, and the point upon which the matter to be determined on this appeal rests is a very short one. In order to make this plain it is necessary to state shortly the circumstances under which the collision took place.

The *Canada* is a paddle-wheel passenger steamer of 1167 tons register. She was bound, on the occasion in question, from Quebec towards Sorel, a place on the south side of the river St. Lawrence. Her regulation lights were duly exhibited and burned brightly, and she had electric lights in her saloons and cabins. She was proceeding, shortly before the collision, up the deep water channel, which is about 300 feet wide, marked by red buoys on the north side and by black buoys on the south side, and after passing a black buoy marked on the chart as 141 L she starboarded her helm with the object of proceeding from the deep-water channel towards Sorel.

The *Cape Breton* is a screw cargo steamer of 1180 tons register and 1764 tons gross register, engaged in the coal trade between Sydney, Quebec, and Montreal. She had been at anchor off the harbour of Sorel on the morning in question, had weighed anchor, and was proceeding down the St. Lawrence with her regulation lights duly exhibited, and thus met in the same channel the *Canada*, which was proceeding up the river. [1907] A. C. p. 117.

Stating the facts very shortly, so far as it is now necessary to

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state them, the *Canada* proceeded up the channel, and, after some slight alterations in her course, as her witnesses allege, her helm was starboarded with the object of directing her course towards Sorel, and it seems now clear that that course was taken without those on board the *Canada* having noticed any coloured light on board the *Cape Breton*, and without having given any signal to the *Cape Breton* that the *Canada* was proceeding to cross the channel in the direction of Sorel. It seems also clear that those on board the *Cape Breton*, which was proceeding on her proper side of the channel, had noticed the *Canada* proceeding up the channel, and that at first she was noticed slightly on the starboard bow, but in the course of her progress, owing to the slight bend in the channel, the *Canada* crossed on to the port bow of the *Cape Breton* and both vessels were approaching red to red, but at first after such crossing it seems that the *Canada* for a moment opened her green light so as to give a flash of it to those on board the *Cape Breton*, and that it was closed in again, and the vessels approached red light to red light.

It was stated on behalf of the *Cape Breton* in the evidence that afterwards, as the vessels drew nearer, the *Canada* shewed all three lights, and that thereupon the pilot of the *Cape Breton* ordered the helm slightly to port and gave one short blast of the whistle, expecting that, when those on the *Canada* had their attention drawn to the *Cape Breton*, she would resume her course, close her green light, and pass port side to port side. Instead, however, of doing so, the *Canada* sounded two short blasts of her whistle and kept on under her starboard helm. Directly the *Canada* gave these two short blasts, the pilot of the *Cape Breton* ordered his helm hard-a-port and his engines full speed astern, and the whistle was sounded again. Almost immediately afterwards the two vessels came into violent collision, the *Cape Breton* being under her port helm and with her engines reversing full speed astern, and the *Canada* being under her starboard helm and going full speed ahead at about fourteen knots. The *Cape Breton* came into contact with the *Canada* on the starboard side of the latter, and the *Canada* sustained so much damage that she sank, and some lives were lost. The *Cape Breton* also sustained damage.

[1907] A. C. p. 118.

A great contest was raised at the trial as to whether or not the *Cape Breton* was properly exhibiting her side-lights for a steamer under way, but that question was decided in favour of the *Cape Breton*, and it was further held that those on board the *Canada* were not keeping a proper look-out. They appear to

have taken the white masthead light of the *Cape Breton* for a steamer at anchor, and never to have noticed either side-lights of the *Cape Breton* until the *Cape Breton* signalled with her whistle to the *Canada*. The *Canada* was clearly to blame in this case for a defective look-out and improperly crossing the course of the *Cape Breton* under her starboard helm, thus breaking the provisions of art. 25 of the Regulations for Preventing Collisions at Sea.

An attempt appears to have been made to justify the action of the *Canada* by virtue of the 33rd rule of the local regulations, which provides that, "Unless it is otherwise directed by the Harbour Commissioners of Montreal, ships or vessels entering or leaving the harbour of Sorel shall take the port side, anything in the preceding articles to the contrary notwithstanding." But this rule was not applicable to the place where the collision took place, and there is nothing in the circumstances which would in any way justify the *Canada* in leaving her own side of the channel and attempting to cross the bows of the *Cape Breton*. The fact that vessels do at times cross over towards Sorel at about the place where the *Canada* starboarded, and that the *Canada* had lights in her cabins which might have shewn that she was a passenger vessel bound to ports on the river, was urged at the trial by the appellants as a reason for holding the *Cape Breton* responsible for not taking action for the *Canada* sooner than was done.

As soon, however, as it is determined that the action of the *Canada* was unjustifiable and contrary to the rules applicable to the place of the collision, the sole question left is whether anything was done or omitted to be done on board the *Cape Breton* for which she ought to be held responsible. The main point taken against the *Cape Breton* on the appeal was that, as the vessels were approaching, the green light of the *Canada* must have been shewn to the *Cape Breton* for such a length of time that those on board the *Cape Breton* ought to have noticed that the *Canada* was attempting to cross her bows in the direction of Sorel, and that the *Cape Breton* ought to have taken action earlier than was done, that is to say, that those in charge of her ought either to have stopped their vessel or to have starboarded their helm and passed the *Canada* green light to green light. This argument was sought to be enforced by a minute criticism of the courses and positions of the vessels principally as given in the evidence of the pilot and other witnesses on board the *Canada;* but the answer to it seems to be reasonably

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clear to their Lordships, viz., that those on board the *Canada* did not notice, as already stated, the coloured lights of the *Cape Breton*, and, therefore, there is nothing in their evidence to negative distinctly the affirmative evidence on the part of the witnesses from the *Cape Breton* that it was only when the vessels were a short distance apart that the green light of the *Canada* suddenly opened on their port bow in the attempt of the *Canada* to cross the channel. At that moment, having regard to the fact that the *Canada* had once before, for a moment, shewn her green light and had then shut it out, the pilot of the *Cape Breton* might at first think that she was repeating an act of erroneous steering and would recover her course, and, therefore, he gave her the one-blast signal and ported slightly to give more room for her to do so, as there was no reason for him to suppose that the *Canada* was bound otherwise than on a course up the channel. After that, as already noticed, the helm of the *Cape Breton* was put hard-a-port, and her engines put full speed astern, when the *Canada* gave two short blasts and indicated that she was about to cross the bows of the *Cape Breton*.

The questions, therefore, which are raised depend upon the answers to the two following questions which their Lordships have submitted to the Nautical Assessors who have assisted them on the hearing of this appeal, and are based upon the evidence given by those on board the *Cape Breton*, which appears to be in accordance with the true facts and probabilities of the case, although the learned judge who heard the case in the first instance felt some doubt upon the matter. The questions are: (1.) Was the pilot of the *Cape Breton* justified in assuming, until he heard the two short blasts from the *Canada*, that the *Canada* could and would pass his vessel port side to port side? (2.) Did such pilot omit any proper precaution after hearing those two short blasts, or did he do all that could reasonably be expected of him in the circumstances in which he was placed by the action of the *Canada*?

[1907] A. C. p. 120.

The answer to the first of these questions is in the affirmative, and to the second, that he did everything that he could reasonably be expected to do.

A minor point was also made by the appellants that the *Cape Breton* ought to have given a short-blast signal when the *Canada* first shewed a flash of her green light, and the helm of the *Cape Breton*, it was alleged, was ported slightly, and afterwards steadied so as to bring the vessel back on her course. But to this point the appellants appear to have orginally attached no importance,

for it is omitted from their preliminary act and statement of claim, and it appears to their Lordships and to the Assessors quite immaterial, for the *Cape Breton* was not altering her course or taking any fresh course, and was only doing what was necessary at the time for the purpose of keeping her proper course on the south side of the channel.

The opinion which their Lordships have formed of this case is substantially in accordance with that entertained by the majority of the judges of the Supreme Court of Canada, and expressed in their judgments, and their Lordships will humbly advise His Majesty to affirm the judgment appealed from, and to dismiss the appeal. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Bischoff, Dodgson, Coxe, Bompas & Bischoff.*

Solicitors for respondents: *Paines, Blyth & Huxtable.*

McGREGOR *v.* ESQUIMALT RLY. [1907], A. C. 462.

J. C.* 1907 *July* 4, 22.

McGREGOR . . . . . DEFENDANT;

AND

ESQUIMALT AND NANAIMO RAILWAY COMPANY . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

British Columbia—Vancouver Island Settlers' Rights Act, 1904—*Construction—Powers of Local Legislature—British North America Act, s.* 92, *sub-s.* 10.

The British Columbia Vancouver Island Settlers' Rights Act, 1904, directed that a grant in fee simple without any reservations as to mines and minerals should be issued to settlers therein defined, and thereunder a grant was made to the appellant of the lot in suit.

By an Act of the same Legislature in 1883, land which included the said lot had been granted with its mines and minerals to the Dominion Government in aid of the construction of the respondents' railway, and in 1887 had been by it granted to the respondents under the provisions of a Dominion Act passed in 1884:—

Held, that the Act of 1904 on its true construction legalized the grant thereunder to the appellant, and superseded the respondents' title.

* *Present:*—LORD ROBERTSON, LORD COLLINS, SIR ARTHUR WILSON, SIR HENRI ELZÉAR TASCHEREAU, and SIR ALFRED WILLS.

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Held, also, that the Act of 1904 was intra vires of the local Legislature. It had the exclusive power of amending or repealing its own Act of 1883. The Act, moreover, related to land which had become the property of the respondents, and affected a work and undertaking purely local within the meaning of s. 92, sub-s. 10, of the British North America Act.

Appeal from a judgment of the Full Court (July 31, 1906), reversing a judgment of Martin, J. (December 29, 1905), which had dismissed the respondents' action.

[1907] *A. C.* *p.* 463.

The questions decided were as to the validity and meaning of an Act of the Legislature of the province of British Columbia, known as the Vancouver Island Settlers' Rights Act, 1904, and as to the effect of a Crown grant in fee simple made thereunder on May 31, 1904, in favour of the appellant.

The respondents claimed to be entitled in fee simple to the coal and minerals in, upon, and under the lands in suit, and sued for a declaration that no right, title, or interest therein passed to the appellant under his said grant.

The respondents' title was founded on British Columbia Act 47 Vict. c. 14 and Dominion Act 47 Vict. c. 6, relating to the construction of the respondents' railway, and the grant to the respondents pursuant thereto dated April 21, 1887.

The appellant by his statement of defence alleged that in 1879 he entered on the said land, and that he was entitled thereto as a pre-emptor under the Land Act (of British Columbia) then in force, and alternatively that he was a "settler" within the meaning of the Vancouver Island Settlers' Rights Act, 1904, and that he was entitled to the said land and minerals under the said grant of 1904.

The nature of the controversy between the parties is fully stated in the judgment of their Lordships.

Martin, J., held that the appellant was a "settler" within the meaning of the Act of 1904, and that the said Act was within the powers of the Legislature of British Columbia, inasmuch as the British North America Act, 1867, s. 92, sub-s. 13, confers an exclusive power upon the provincial Legislatures to make laws in relation to "property and civil rights in the province," and that consequently, by the combined effect of the Provincial Act of 1904 and the Crown grant of May 31, 1904, the appellant's title was valid.

The Full Court reversed this decision. The Chief Justice said with reference to the Settlers' Rights Act of 1904 "that the Legislature considered that there may be persons who have a valid claim to lands within the belt, but who are unable to

assert their rights by reason of poverty or limited means; that it decided to enable such rights, if any, to be effectively asserted by authorizing the issue of Crown grants in fee, which would, of course, transfer any interest left in the Crown, and which would throw the onus of the litigation on the company while the rights, if any, of the grantee are to be upheld and maintained by the province.

"There is nothing in the operative clauses of the Act which in terms purports to declare the title in the land to be in the Crown or attempts to deprive the company of any interest vested in it under its patent from the Dominion, and we must, of course, impute a rational and beneficial intention to the Legislature rather than an irrational and injurious intention." [1907] *A. C.* p. 464.

He held that, whatever the intention of the Act, so far as the defendant was concerned, the grant on which he relied was inoperative, as there was no interest left in the Crown to convey.

Sir R. B. Finlay, K.C., and *Hamar Greenwood* (*J. A. Simon* with them), for the appellant, contended that the judgment of Martin, J., was right and ought to be restored. The Act of 1904 was within the powers of the provincial Legislature of British Columbia: see British North America Act, 1867, s. 92, sub-s. 10. It could not be contended that that Legislature had been deprived by its own Act, 47 Vict. c. 14, of the power to repeal or modify the same by subsequent legislation. The appellant is a settler within the meaning of the Act of 1904, and by the combined effect of that Act and the grant made thereunder he has a good title to the land in suit and to the coal and other minerals beneath it, a title which supersedes or defeats any claim which the respondents might otherwise have had thereto. Reference was made to *Hoggan* v. *Esquimalt and Nanaimo Ry. Co.* (1) as to the meaning of the term "settler."

Luxton, K.C., and *Rowlatt*, for the respondents, contended that on May 31, 1904, the date of the grant to the appellant, and on February 10, 1904, the date of passing the Act of 1904, the Government of British Columbia had no estate or interest whatever in the lands in suit, and that nothing passed by that grant. At those dates the lands, including coal and minerals, were vested in the respondents under the Dominion grant of April 21, 1887, in fee simple, subject as to the surface to any rights which the appellant might have under 47 Vict. c. 14, s. 23, and 47 Vict. c. 6, s. 7, which rights are not now in question. The Act of [1907] *A. C.* p. 465.

(1) [1894] A. C. 429.

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1904 on its true construction does not divest the respondents of their title under their grant to the coals and minerals. Power to deal with the land had been alienated by the province. It was granted by the provincial Government to the Dominion Government by the provincial statute 47 Vict. c. 14. It was thereupon held by the Dominion Government in trust to be appropriated as the Dominion Government should think fit. The Dominion Government thereupon appropriated and granted the said land and coal and minerals thereunder to the respondents in fee simple. It did so as a subsidy for the construction, equipment, maintenance, and operation of the respondents' railway and telegraph line. It was contended that such appropriation and grant could not be repealed or varied except by the Dominion Parliament. So far as the Act of 1904 purported to affect lands which the province had by provincial statute granted to the Dominion, it was ultra vires of the provincial Legislature. The tract of land which included the land in suit was granted to the Dominion in trust for the construction of a railway under the eleventh paragraph of the Forms of Union of the Dominion and the province; and an agreement in 1883 between the two Governments provided for the grant, the incorporation of certain persons to be designated by the Dominion for the construction of the railway, and for a contribution by the Dominion thereto.

Sir R. Finlay, K.C., replied.

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July 22.

The judgment of their Lordships was delivered by

SIR HENRI ELZÉAR TASCHEREAU. This is an appeal from the Supreme Court of British Columbia.

The respondents, a company incorporated by an Act of the Legislature of the province of British Columbia, claimed by their action the title to a certain lot of land in that province, including all mines and minerals therein and thereunder, under a grant to them in 1887 by the Dominion Government. The appellant, in answer to the action, claimed the title to this same lot in fee simple in virtue of a grant to him in 1904 by the British Columbia Government, issued under the provisions of an Act of the Legislature of the province entitled "The Vancouver Island Settlers' Rights Act, 1904."

[1907] *A. C.* *p.* 466.

The only controversy between the parties is as to the right to the mines and minerals in the said lot. The respondents, in their statement of claim, admit the appellant's right to a conveyance of the surface rights thereof.

The salient facts of the case, as far as necessary for the solution of the controversy between the parties in the view their Lordships take of it, may be summarized as follows:—

On December 19, 1883, the British Columbia Legislature passed an Act (47 Vict. c. 14) granting to the Dominion Government in aid of the construction of the respondents' railway a certain area of land embracing the lot in dispute between the parties.

On April 21, 1887, the Dominion Government, under the provisions of an Act of Parliament passed in April, 1884, granted the said land to the respondents, with certain reservations as to surface rights which, as previously stated, are not in question here.

The appellant's contention is that this grant by the Dominion Government to the respondents must be deemed to have been cancelled by the aforesaid grant to him by the British Columbia Government. The respondents, on the other hand, contend that the grant to the appellant did not divest them of their title to the property.

The action was tried by Martin, J., who upheld the appellant's contentions and dismissed the respondents' action. On appeal the Full Court reversed Martin, J.'s decision and maintained the action on the exclusive ground that the British Columbia Act of 1904 did not authorize the grant of the said lot to the appellant, and, consequently, that the said lot, notwithstanding the said grant, remained the property of the respondents under the grant to them by the Dominion Government. The appellant has to concede that, but for the British Columbia Act of 1904 and the grant to him under its provisions, the respondents' title to the mines and minerals in question would be incontrovertible, so that the only questions for determination on this appeal are, first, Did the Act of 1904 and the grant to the appellant under its provisions have the effect of superseding the respondents' title under the grant to them by the Dominion and legalizing the grant to the appellant? and, secondly, If so, had the British Columbia Legislature the power to enact it?

[1907] A. C. p. 467.

These two questions their Lordships answer in the affirmative.

First, as to the true construction of the Act. On that point it seems to their Lordships unquestionable that the Act would be altogether abortive and meaningless if the view taken of it by the Supreme Court of British Columbia were to prevail. That the word "settler" in the Act includes the appellant, as held by the trial judge, has not been questioned by the learned judges in

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the Full Court, and that the lot in dispute is in the railway belt therein mentioned is not controverted. The reasoning upon which the learned judges upheld the respondents' contentions is summed up by the Chief Justice for the Court in the following words: "There is nothing in the operative clauses of the Act (s. 3), which in terms purports to declare the title in the land to be in the Crown or attempts to deprive the company of any interest vested in it under its patent from the Dominion, and we must, of course, impute a rational and beneficial intention to the Legislature rather than an irrational and injurious intention."

Their Lordships cannot concur in that opinion. It seems clear to them that the true construction of that clause is that it imposes upon the Crown the obligation, and does not merely confer the power, of issuing a grant to certain of the settlers therein mentioned, of whom the appellant is one. It reads as follows: "Upon application being made to the Lieutenant-Governor in council, within twelve months from the coming into force of this Act, shewing that any settler occupied or improved land within said railway belt prior to the enactment of chapter 14 of 47 Victoria (1883), with the bona fide intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler."

[1907] A. C. p. 468.

In their Lordships' opinion this enactment in a remedial Act, read with the other parts of it, means clearly that a grant in fee simple, without any reservations as to mines and minerals, of any of the land therein mentioned, including the lot in question, if applied for within twelve months, as was done by the appellant, should be issued to the settlers therein mentioned, including the appellant as to the particular lot in dispute, though previously such a grant could not legally have been issued, because the said land had already been granted with its mines and minerals to the Dominion Government by the Provincial Act of 1883, and subsequently by the Dominion Government to the respondents. If the Act of 1904 did not apply to this lot, amongst others, because the title to it was then vested in the respondents, it would have no possible application at all. Such a construction would defeat the clear intention of the Legislature.

On the constitutionality of the Act of 1904 and the power of

the British Columbia Legislature to enact it their Lordships see no reason for doubt. The Legislature had the exclusive right to amend or repeal in whole or in part its own said statute of December, 1883 (47 Vict. c. 14). And the Act relates, not to public property of the Dominion, as contended for by the respondents, but to property and civil rights in the province, and affects a work and undertaking purely local (s. 92, sub-s. 10, of the British North America Act). This railway is the property of the respondents, and the said land had ceased to be the property of the Dominion in 1887 by the grant thereof to the respondents. By an Act passed in 1905 by the Dominion Parliament the legislative power over the company has since been transferred to the federal authority, but that Act, of course, has no application to this case.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed; that the judgment of the Supreme Court of July 31, 1906, ought to be reversed with costs to be paid by the railway company, and the judgment of Martin, J., dismissing the action with costs, restored.

The respondents will pay to the appellant the costs of this appeal.

Solicitors for appellant: *Gard, Rook & Co.*

Solicitors for respondents: *Hepburn, Son & Cutcliffe.*

TORONTO *v.* C.P.R. [1908], A. C. 54.

J. C.* 1907 *July*, 11, 12; *Nov.* 18.

CORPORATION OF THE CITY OF TORONTO . DEFENDANTS;

AND

CANADIAN PACIFIC RAILWAY COMPANY . PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

British North America Act, 1867, *s.* 91, *sub-s.* 29; *s.* 92, *sub-s.* 10 (*a*)—*Dominion Railway Act of* 1888, *ss.* 187 *and* 188, *intra vires*—*Interpretation Act* (*R. S. C.*, 1886, *c.* 1), *s.* 7, *sub-s.* 2—*Construction*—"*Person.*"

The Railway Committee of the Privy Council of Canada, by order made under ss. 187 and 188 of the Dominion Railway Act (51 Vict. c. 29), directed certain measures to be taken for safeguarding the respondents' railway, which is a through railway, and for the protection of the public in traversing it at certain level crossings where it passes across public streets at

* *Present*:—LORD ROBERTSON, LORD COLLINS, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

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points within or immediately adjoining the boundary of the appellant city, and directed the cost thereof to be borne in equal proportions by the railway and the city.

In a suit by the railway after the execution of works as directed to recover the apportioned amount from the corporation :—

Held, that ss. 187 and 188 were intra vires of the Dominion Legislature by force of the British North America Act, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10 (*a*).

Held, also, that, having regard to s. 7, sub-s. 2, of the Interpretation Act (R. S. C., 1886, c. 1), "person" in s. 188 includes a municipality.

Appeal from a judgment of the Court of Appeal for Ontario (April 22, 1907), affirming a judgment of Mabee, J. (October 3, 1906), in favour of the respondents.

By an order of the Railway Committee of the Privy Council of Canada (January 8, 1891), the respondent company was ordered to provide gates and watchmen at certain level crossings, to wit at Bathurst and Dufferin Streets, and at Avenue Road, mentioned in the said order; and it was further directed that one-half of the costs attending the placing and maintaining of the gates and watchmen be contributed by the appellants. The object of the order was to protect the public from accidents in the operation of the respondents' railway system.

[1908] A. C. p. 55.

The question raised was whether this order, so far as it imposed liability on the appellants in respect of the costs of protecting the crossing, was valid and binding on the appellants. This involved the question whether ss. 187 and 188 of the Dominion Railway Act, 1888, under which the order was made, were intra vires of the Dominion. Sect. 187 authorized the Railway Committee, in the case of a railway constructed across any street or other public highway, at rail level or otherwise, to "require the company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman, or by a watchman and gates or other protection."

Sect. 188 is as follows: "The Railway Committee may make such orders and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof and of any such measures of protection between the said company and any person interested therein, as appear to the Railway Company just and reasonable."

The respondents sued to recover from the appellants the apportioned amount of their liability for works executed by the respondents under the above orders of the Railway Committee. The appellants contended that ss. 187 and 188 were ultra vires of the Dominion Parliament.

Mabee, J., held that the case was governed by *In re Canadian Pacific Ry. Co. and County of York* (1) and *City of Toronto* v. *Grand Trunk Ry. Co.* (2), and decreed the suit.

The Court of Appeal affirmed this decision.

Sir E. Carson, K.C., *Fullerton, K.C.*, and *W. N. Tilley*, for the appellants, contended that it was ultra vires the Dominion to enact legislation under which they could be charged for work either for a railway or a municipal purpose. They admitted that the respondents' railway was a work within the legislative jurisdiction of the Dominion, but submitted that the appellants were governed by provincial legislation. They could only be authorized to spend moneys for purposes directed by provincial legislation. They were not liable to be directed by the Dominion to contribute moneys for any purpose. Reference was made to the Consolidated Municipal Act of Ontario, 1903 (3 Edw. 7, c. 19), ss. 599, 600, 601, s. 606, sub-s. 1, and s. 611, as containing the only provincial legislation bearing on the subject, and it was contended that any liability imposed thereby did not apply in the case of a Dominion railway. The appellants are not liable to be taxed in aid of the respondents under any legislation, nor was it incidentally necessary to the carrying out of the railway that they should be. Further, the corporation is not a "person interested" within the meaning of s. 188. Reference was made to *Attorney-General for Ontario* v. *Attorney-General for Canada* (3).

[1908] A. C. p. 56.

Sir R. Finlay, K.C., *A. R. Creelman, K.C.*, and *Geoffrey Lawrence*, for the respondents, contended that s. 91, sub-s. 29, of the British North America Act gave to the Dominion exclusive jurisdiction over this railway. Consequently ss. 187 and 188 of the Railway Act, 1888, and the corresponding sections of the Railway Act of 1903 are intra vires of the Dominion Parliament as being ancillary to through railway legislation, notwithstanding that they affect civil rights. Reference was made to *Grand Trunk Ry. Co.* v. *Attorney-General of Canada* (4); *Madden* v. *Nelson and Fort Sheppard Ry.* (5); *Tennant* v. *Union Bank of Canada* (6). Dominion legislation, where it is valid, is of paramount authority, even though it trenches on matters assigned to the province. The appellants are persons interested within the meaning of s. 188 of the former Act and s. 47 of the later Act: see also Interpretation Act (R. S. C., 1886, c. 1), s. 7, sub-s. 2, according to which "person" includes municipality. The orders of the Railway Committee and of the Board which succeeded it under the later Act

(1) (1896) 27 Ont. Rep. 559; (1898) 25 Ont. A. R. 65.
(2) (1906) 37 Can. S. C. R. 232.
(3) [1896] A. C. 348, 359, *ante*, p. 481.
(4) [1907] A. C. 65, *ante*, p. 636.
(5) [1899] A. C. 626, *ante*, p. 571.
(6) [1894] A. C. 31, 45, 47, *ante*, p. 433.

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are final, and bind the appellants: see *Williams* v. *Adams* (1); the Railway Act of 1903, s. 33; and s. 144 of the Act of 1888. Reference was also made to *City of Toronto* v. *Grand Trunk Ry. Co.* (2); *In re Canadian Pacific Ry. Co. and County of York* (3); *Ottawa Electric Ry. Co.* v. *City of Ottawa* (4).

Fullerton, K.C., replied.

1907 *Nov.* 18.

The judgment of their Lordships was delivered by

[1908] *A. C.* *p.* 57.

LORD COLLINS. The question on this appeal is as to the liability of the appellants, the corporation of the city of Toronto, to pay a share of the cost of certain protective measures ordered by the Railway Committee of the Privy Council of Canada for the purpose of safeguarding the public in traversing the respondents' railway, and the railway itself, at certain level crossings where it passes across public streets at points within or immediately adjoining the city boundary. At two of the crossings the southern boundary of the railway is the northern boundary of the city. In the third the crossing is wholly within the city.

The order of the Railway Committee, which was dated January 8, 1891, and purported to be made under the 187th and 188th sections of the Dominion Railway Act, 1888 (51 Vict. c. 29), directed that gates and watchmen should be provided and maintained by the railway company at the said crossings, and that the cost thereof should be borne in equal proportions by the railway company and the corporation. Some two years later there was a slight re-adjustment of the proportions, but nothing turns on this. The corporation continued to pay the adjusted proportion without complaint down to 1901, when they disputed liability and ceased payment. Hence this action, in which the railway sued the corporation to recover the apportioned amount. No question arises as to the amount, if liability is established, but the appellants contend that the sections under which the order was made were ultra vires of the Dominion Parliament, and that even if they were intra vires, the corporation did not fall within the words "any person interested therein" in s. 188, and could not, therefore, be made liable to pay any apportioned share of the expenses. Mabee, J., the trial judge, decided against the corporation, on the ground that the point was concluded by cases decided in Canada binding upon him, and his judgment was affirmed by the Court of Appeal for Ontario.

[1908] *A. C.* *p.* 58.

First, with regard to the question of ultra vires. There is no doubt that "railways connecting the province with any other or others of the provinces" are expressly excepted from the jurisdiction

(1) (1862) 2 B. & S. 312.
(2) 37 Can. S. C. R. 232.
(3) 25 Ont. A. R. 65.
(4) (1906) 37 Can. S. C. R. 354.

of the provinces and placed under the exclusive jurisdiction of the Parliament of the Dominion by the Imperial statute 30 & 31 Vict. c. 3, the British North America Act, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10 (*a*). On the other hand, by s. 92 of the same Act, municipal institutions in the province and property and civil rights in the province are placed under the exclusive power of the provincial Legislature. Questions of conflict between the two jurisdictions, that of the Dominion and that of the province, have frequently come before this Board, and the result of the decisions is thus summed up by Lord Dunedin, in delivering the judgment in the most recent case, *Grand Trunk Ry. Co.* v. *Attorney-General of Canada* (1). He treats the following propositions as established :—

" First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

In the present case it seems quite clear to their Lordships that if, to use the language above quoted, " the field were clear," the sections impugned do no more than provide reasonable means for safeguarding in the common interest the public and the railway which is committed to the exclusive jurisdiction of the Legislature which enacted them, and were, therefore, intra vires. If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and in the view of their Lordships there is nothing ultra vires in the ancillary power conferred by the sections on the committee to make an equitable adjustment of the expenses among the persons interested. This legislation is clearly passed from a point of view more natural in a young and growing community interested in developing the resources of a vast territory as yet not fully settled than it could possibly be in the narrow and thickly populated area of such a country as England. To such a community it might well seem reasonable that those who derived special advantages from the proximity of a railway might bear a special share of the expenses of safeguarding it. Both the substantive and the ancillary provision are alike reasonable and intra vires of the Dominion Legislature, and on the principles above cited must prevail, even if there is legislation intra vires of the provincial Legislature dealing with the same subject-matter and in some sense inconsistent. But it seems to their Lordships that in truth there is no real inconsistency, and both may stand together. The through railway is a subject-matter excepted out of the jurisdiction of the province, and there is no express provi-

[1908] A. C. p. 59.

(1) [1907] A. C. 65, *ante*, p. 638.

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sion in the British North America Act defining the jurisdiction of the province inconsistent with the right vested in the Dominion to provide for the safeguarding of the subject-matter thus excluded from the jurisdiction of the province. The jurisdiction conferred over property and civil rights in the province is quite consistent with a jurisdiction specially reserved to the Dominion in respect of a subject-matter not within the jurisdiction of the province. The rights in the highways conferred on the municipality by the sections of the Consolidated Municipal Act, 1903, 3 Edw. 7. c. 19 (Ontario), cited in the appellants' case, do not, in their Lordships' opinion, help the appellants at all on the ultra vires point, though they bear strongly against them on the point that they are not "persons interested."

With regard to this latter point, it is clear from s. 7, sub-s. 22, of the Interpretation Act, R. S. C., 1886, c. 1, cited by Sir R. Finlay, that the word "person" includes a municipality; and their Lordships fully concur in the conclusion and reasoning of Meredith, J.A., in the Court below, that in this case the municipality was a person interested. It is not necessary to say anything upon the other points argued.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Freshfields.*
Solicitors for respondents: *Blake & Redden.*

J. C.* 1908 *July* 9, 31.

CROWN GRAIN CO. *v.* DAY [1908], A. C. 504.

CROWN GRAIN COMPANY, LIMITED . . DEFENDANTS;

AND

H. L. DAY . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Powers of Provincial Legislature—Appellate Jurisdiction of Supreme Court of Canada—Manitoban Act (*R. S. M.* c. 110, *s.* 36) *limiting Right of Appeal ultra vires—British North America Act*, 1867, *s.* 101.

By s. 101 of the British North America Act, 1867, the Parliament of Canada was authorized to establish the Supreme Court of Canada, the existing statute being R. S. C. 1906, c. 139, ss. 35 and 36 of which define its appellate jurisdiction in respect of any final judgment of the highest

* *Present:*—LORD LOREBURN, L.C., LORD ROBERTSON, LORD ATKINSON, SIR ARTHUR WILSON, and SIR HENRI ELZÉAR TASCHEREAU.

Court of final resort now or hereafter established in any province of Canada.

The Manitoban Mechanics' and Wage Earners' Lien Act (R. S. M. c. 110, s. 36) applies to the suit under appeal and enacts that in suits relating to liens the judgment of the Manitoban Court of King's Bench shall be final and that no appeal shall lie therefrom :—

Held, that the provincial Act could not circumscribe the appellate jurisdiction granted by the Dominion Act.

Appeal by special leave from an order of the Supreme Court (May 22, 1907) which dismissed the appellants' motion to quash an appeal from the Manitoban Court of King's Bench in banc (January 18, 1906).

The question decided was whether the Legislature of Manitoba had power to enact by c. 110, s. 36, of its revised statutes as follows :— Sect. 36. "In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is more than one hundred dollars, any party affected thereby may appeal therefrom to the Court of King's Bench in banc, whose judgment shall be final and binding, and no appeal shall lie therefrom. The procedure upon appeal from the judgment of a local judge shall be the same as upon appeal from a judgment of a judge. 61 Vict. c. 29, s. 36."

[1908] *A. C.* *p.* 505.

The action was brought alleging that the respondent had in respect of materials furnished and work done become entitled to a lien under the Act upon certain lands and buildings thereon, the property of the appellants; that subsequently the respondent, pursuant to the said Act, caused to be filed and registered in the Winnipeg Lands Titles Office a statement of his claim or lien in the form provided and duly verified as required by the Act, and the respondent claimed payment of the sum of $2020·00, the balance alleged to be due, together with interest.

Macmaster, *K.C.*, and *Hickson*, *K.C.*, for the appellants, contended that the rights acquired under the Manitoban Act were the creation of the statute and are subject to its limitations and restrictions. The particular right of lien in question is a civil right arising out of contract and is intra vires of the provincial Legislature. The Act was assented to by the Crown and only limits the right of appeal as incident to a particular contract. It in no way conflicts with the general appellate jurisdiction of the Supreme Court as established by the Dominion under s. 101 of the British North America Act, 1867. They referred to *Théberge* v. *Landry* (1); *Citizens' Insurance Co.* v. *Parsons* (2); *Dobie* v. *Temporalities Board* (3); *Hodge* v. *Reg.* (4);

(1) (1876) 2 App. Cas. 102.
(2) (1881) 7 App. Cas. 96, *ante*, p. 267.
(3) (1881) 7 App. Cas. 136, *ante*, p. 293.
(4) (1883) 9 App. Cas. 117, *ante*, p. 333.

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[1908] *A. C. p.* 506.

Attorney-General for Ontario v. *Attorney-General for Dominion* (1); *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (2); *Grand Trunk Ry. Co. of Canada* v. *Attorney-General of Canada* (3); *Danjou* v. *Marquis* (4); *Clarkson* v. *Ryan* (5); *City of Halifax* v. *McLaughlin Carriage Co.* (6).

Th. Chase-Casgrain, K.C., for the Attorney-General of Manitoba, intervenant, contended that the power given by s. 101 of the British North America Act, 1867, to the Dominion to create a general Court of Appeal for Canada in no way abridged the rights of litigants to appeal to the King in Council directly from the decision of a Court of last resort in a province. Similarly it did not deprive the province of the right to create provincial Courts with limited rights of appeal therefrom. It contemplated the creation of a general Court of Appeal to which litigants might resort in cases where the appeal had not been competently regulated by the provinces in matters in regard to which those provinces had exclusive jurisdiction.

Ewart, K.C., and *R. O. B. Lane, jun.*, for the respondent, and *Newcombe, K.C.*, for the Attorney-General for the Dominion, intervenant, were not heard.

1908 *July* 31.

The reasons for their Lordships' report were delivered by

LORD ROBERTSON. By the 101st section of the British North America Act, 1867, the Parliament of Canada was authorized to provide for "the constitution, maintenance, and organization of a general Court of Appeal for Canada"; and by Act of the Dominion Parliament the Supreme Court of Canada was accordingly established, the existing statute being Rev. Stat. Canada, 1906, c. 139. It is inconceivable that a Court of Appeal could be established without its jurisdiction being at the same time defined; and this statute contains these provisions:—

"The Supreme Court shall have, hold, and exercise an appellate civil and criminal jurisdiction within and throughout Canada" (s. 35).

"Except as hereinafter otherwise provided an appeal shall lie to the Supreme Court from any final judgment of the highest Court of final resort now or hereafter established in any province of Canada" (s. 36).

If this Dominion statute be the governing enactment in hac re, it unquestionably allows the appeal to the Supreme Court of Canada, the competency of which was challenged in this case.

(1) [1896] A. C. 348, *ante*, p. 481.
(2) [1902] A. C. 73, *ante*, p. 574.
(3) [1907] A. C. 65, *ante*, p. 636.
(4) (1879) 3 Can. Sup. Ct. Rep. 251.
(5) (1890) 17 Can. Sup. Ct. Rep. 251.
(6) (1907) 39 Can. Sup. Ct. Rep. 174.

The question now in dispute is whether that enactment has been affected, and so far defeated, by an Act of the Legislature of Manitoba which admittedly purports to apply to the suit in which the appeal was brought, and which makes the judgment of the provincial Court final and conclusive. The Manitoba statute relates to liens; and it is in regard to suits about liens that appeal is excluded. Liens are admittedly in the region of legislation appropriated to provincial Legislatures by the British North America Act. It is incidentally to the subject of liens that the Manitoban legislation provides that the judgment of the Court of King's Bench on suits relating to liens shall be final and binding, and that no appeal shall lie therefrom. This enactment is in direct conflict with the general provisions of appeal in the Dominion Act; and the question is, which enactment prevails?

[1908] *A. C.* *p.* 507.

The appellants maintain that the implied condition of the power of the Dominion Parliament to set up a Court of Appeal was that the Court so set up should be liable to have its jurisdiction circumscribed by provincial legislation dealing with those subject-matters of litigation which, like that of contracts, are committed to the provincial Legislatures. The argument necessarily goes so far as to justify the wholesale exclusion of appeals in suits relating to matters within the region of provincial legislation. As this region covers the larger part of the common subjects of litigation, the result would be the virtual defeat of the main purposes of the Court of Appeal.

It is to be observed that the subject in conflict belongs primarily to the subject-matter committed to the Dominion Parliament, namely, the establishment of the Court of Appeal for Canada. But, further, let it be assumed that the subject-matter is open to both legislative bodies; if the powers thus overlap, the enactment of the Dominion Parliament must prevail. This has already been laid down in *Dobie* v. *Temporalities Board* (1) and *Grand Trunk Ry. Co. of Canada* v. *Attorney-General of Canada* (2).

For these reasons their Lordships on the July 9 last agreed humbly to advise His Majesty that the appeal ought to be dismissed, and directed the appellants to pay the respondent's costs of the appeal, and the Attorney-General for the Dominion of Canada and the Attorney-General of Manitoba to bear their own costs respectively.

[1908] *A. C.* *p.* 5.

Solicitors for appellants and the Attorney-General for Manitoba: *Lawrence Jones & Co.*

Solicitors for respondent: *Harrison & Powell.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

(1) 7 App. Cas. 136, *ante*, p. 293. (2) [1907] A. C. 65, *ante*, p. 638.

J. C.* 1908 *July* 14, 15, 31.

WOODRUFF *v.* ONTARIO [1908], A. C. 508.

ALFRED S. WOODRUFF AND OTHERS . . DEFENDANTS;

AND

ATTORNEY-GENERAL FOR ONTARIO . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Powers of Provincial Legislature—British North America Act, 1867, *s.* 92, *sub-s.* 2—*Ontario Succession Duty Act* (*R. S. O.*, 1897, c. 24)—*Provincial Taxation of Property not within the Province ultra vires.*

It is ultra vires the Legislature of Ontario to tax property not within the province: see British North America Act, 1867, s. 92, sub-s. 2:—

Held, accordingly, that the Succession Duty Act (R. S. O., 1897, c. 24) does not include within its scope movable properties locally situated outside the province of Ontario which it was alleged that the testator, a domiciled inhabitant of the province, had transferred in his lifetime with intent that the transfers should only take effect after his death.

Blackwood v. *Reg.*, (1883) 8 App. Cas. 82, followed.

Appeal and cross-appeal from a judgment of the Court of Appeal (December 31, 1907) modifying a judgment of Falconbridge, C.J., (January 5, 1907) dismissing the respondent's action.

The Court of Appeal held, under the circumstances which are detailed in their Lordships' judgment, that the executors of Samuel De V. Woodruff's will wrongfully omitted from their affidavit of value and relationship the property comprised in the transfers or settlements of 1902. Meredith, J.A., held that the property comprised in the trust deeds of 1894 was also wrongfully omitted.

The appellants claimed that this judgment should be reversed and that the dismissal of the action on January 5, 1907, should be restored. The respondent claimed in cross-appeal that the Court of Appeal should have included the property comprised in the deed of 1894 within its decree.

[1908] *A. C.* *p.* 509.

The respondent sued to recover succession duty payable to the province of Ontario by virtue of the Succession Duty Act, being R. S. O., 1897, c. 24, as amended by 62 Vict. (2) c. 9 (Ont.), 1 Edw. 7, c. 8, s. 6 (Ont.), and 2 Edw. 7, c. 12, s. 6 (Ont.).

The question decided by their Lordships was whether the Succes-

* *Present*:—LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

sion Duty Act as amended was intra vires of the provincial Legislature.

Danckwerts, K.C., and *H. H. Collier, K.C.*, for the appellants, after contending that the foreign municipal bonds and debentures in suit were not, in the circumstances of the case, dutiable under the Succession Duty Act according to its true construction, submitted that that Act, so far as it related to property outside the province, was ultra vires the provincial Legislature. They referred to ss. 91 and 92 of the British North America Act, 1867. The tax claimed in this case must be regarded as in the nature of an estate or probate duty imposed directly on property rather than on the persons taking. Though the property was movable it had a foreign situs and cannot be taxed by the Act of a province in which it was not locally situated. On the other hand, if the tax was not imposed on property, but on the acquisition thereof as a succession duty, then it was an indirect tax and not within any of the classes of subjects enumerated in s. 92, sub-s. 2, of the Act of 1867. Reference was made to *Citizens' Insurance Co.* v. *Parsons* (1); *Attorney-General for Quebec* v. *Reed* (2); *Bank of Toronto* v. *Lambe* (3); *Brewers and Maltsters' Association of Ontario* v. *Attorney-General of Ontario* (4); *Harding* v. *Commissioners of Stamps for Queensland* (5); *Blackwood* v. *Reg.* (6); *Henty* v. *Reg.* (7); *Macleod* v. *Attorney-General of New South Wales* (8). [1908] A. C. p. 510.

Sir R. Finlay, K.C., and *Ingersoll, K.C.*, for the respondent, contended that under the circumstances of the case, the bona fide possession of the properties transferred not having been assumed by the transferees to the exclusion of the donor, and only contemplated from the date of his death, those properties were liable to duty as claimed. The legislation in question was intra vires the Ontario Legislature. The duty claimed was not a tax on property, but a tax on the devolution or succession. The duty was imposed on persons beneficially entitled by virtue of the will of the deceased or by virtue of the testamentary transfers made by him in his lifetime to take effect at his death. The persons taxed were resident in the province and were directly liable for the duty under s. 5, sub-s. 3, and s. 4 of the Act of 1897. The Act in question, therefore, is "direct taxation within the province in order to the raising of a revenue for provincial purposes" within s. 92, sub-s. 2, of the British North America Act,

(1) (1881) 7 App. Cas. 96, *ante*, p. 267.
(2) (1884) 10 App. Cas. 141, *ante*, p. 360.
(3) (1886) 12 App. Cas. 575, *ante*, p. 378.
(4) [1897] A. C. 231, *ante*, p. 529.
(5) [1898] A. C. 769.
(6) 8 App. Cas. 82, 93.
(7) [1896] A. C. 567, 571.
(8) [1891] A. C. 455.

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1867. Reference was made to *Hodge* v. *Reg.* (1); *Bank of Toronto* v. *Lambe* (2); *Dow* v. *Black* (3).

Danckwerts, *K.C.*, replied.

The judgment of their Lordships was delivered by

LORD COLLINS. The question on these appeals is as to the right of the Attorney-General of the province of Ontario to demand payment of a tax, called in the provincial Act (4) which imposed it "succession duty," upon personal property locally situate outside the province and alleged by him to form part of the estate of a deceased domiciled inhabitant of the province, one Samuel De Veaux Woodruff. This question involves the consideration of two separate transactions, or sets of transactions, whereby the deceased divested himself, or assumed to divest himself, of certain personal property locally situate in the State of New York. The first of these transactions took place in 1894, the second in 1902. The deceased died on October 28, 1904, domiciled, as above stated, in the province of Ontario.

[1908] *A. C.* *p.* 511.

The present suit was brought by the Attorney-General in February, 1906, to have it declared that the property comprised in the said transactions of 1894 and 1902 (as well as certain other property described as "the homestead property") was improperly omitted from a certain affidavit to lead probate filed by the first three defendants (appellants) as executors of the said S. De V. Woodruff in the Surrogate Court, and claiming an account of the dutiable value of the said property and payment of the amount of the succession duty thereon. The action was tried before Falconbridge, Chief Justice of the King's Bench Division of the High Court, who on January 5, 1907, held that the homestead property, which had been settled on the testator's wife and his son H. K. Woodruff, was improperly omitted from the affidavit, but that the property comprised in the transactions of 1894 and 1902 was not improperly omitted from the affidavit, and as the value of the homestead property, added to the estate disclosed, did not bring the property up to the minimum value fixed by the Succession Duty Act for payment of duty in the case of property going to a wife and children, he dismissed the action. On appeal to the Court of Appeal for Ontario the decision of the trial judge as to the homestead property and the transaction of 1894 was affirmed, but was overruled as to the transaction of 1902; and as to the amount comprised in the latter the defendants were held liable to pay succession duty. No question has been raised before their Lordships as to the homestead property,

(1) (1883) 9 App. Cas. 117, *ante*, p. 333.
(2) 12 App. Cas. 575, *ante*, p. 378.
(3) (1875) L. R. 6 P. C. 272, *ante*, p. 212.
(4) The Succession Duty Act (Rev. Stat. Ont., 1897, c. 24).

but both parties have appealed as to the transactions of 1894 and 1902, the defendants seeking to set aside the decision against them as to the transaction of 1902, and the plaintiff, by way of cross-appeal, claiming duty in respect of the transaction of 1894. Though this latter claim arises by way of cross-appeal only, and the main appeal is by the defendants in respect of the transaction of 1902, it is perhaps more convenient to take them in chronological order and begin with the transaction of 1894.

In that year the Mercantile Safe Deposit Company in New York City held in their custody for Samuel De V. Woodruff bonds and debentures issued by various municipalities in the United States, and transferable by delivery, amounting in value to about $213,000. He arranged with the United States Trust Company of New York that they should take over the custody of these securities to be held by them in trust to carry out the terms of certain deeds to be executed by each of his four sons. He then, in company with his son H. K. Woodruff, went to New York, taking with him four trust deeds executed by his four sons respectively, and delivered these deeds with four parcels of the securities, one parcel appropriated to each deed, to the Trust Company to hold under the terms of the trusts so created. These trusts were for the benefit of each of the sons respectively during his life and for his children after him in equal shares. During the life of Samuel De V. Woodruff the income derived from these securities was sent by the Trust Company half-yearly to the sons respectively by cheques on a New York bank. These cheques were sent on by the sons to S. De V. Woodruff, who returned to each of them $1500 per annum. The evidence was that there was no agreement, arrangement, or bargain of any kind between the father and the sons that he should receive this income or any portion of it, and that this action on the part of the sons was entirely voluntary. Falconbridge, C.J., held as to the transactions both of 1894 and 1902 that the Act did not "extend to this particular property situated in the State of New York . . . . and governed by the laws of New York," and that, in the view he took of the case, the intentions and motives of the testator and his sons were not in issue.

[1908] *A. C.* p. 512.

The subject-matter of the transfer of 1902 consisted of similar bonds or debentures, also then in the custody of the Mercantile Safe Deposit Company, New York, and a cash balance in the hands of Messrs. E. D. Shepard & Co., bankers, New York City, the proceeds of collections of interest they had made for S. De V. Woodruff, together with certain coupons and bonds in their hands for collection, amounting in all to a par value of about $443,257. By written directions from S. De V. Woodruff to the Safe Deposit Company and Messrs. Shepard

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[1908] *A. C.* *p.* 513.

respectively the above securities were in August, 1902, transferred in their books into the names of his three sons, and in the case of his safe in the custody of the Safe Deposit Company into the names of his three sons and his wife. The securities remained thus locally situate in the State of New York until the death of S. De V. Woodruff in October, 1904. As has been above stated, the trial judge made no distinction between the 1894 and the 1902 transactions. He treated them both as falling outside the scope of the provincial Act. The majority of the Court of Appeal, however, held that the second of the two transactions fell within the Act, while they affirmed the view of the trial judge as to the first. Meredith, J.A., held that both were alike covered by the Act.

In the opinion of their Lordships no sound distinction in point of law can be made between the two transactions. They both were concerned with movable property locally situate outside the province, and the delivery under which the transferees took title was equally in both cases made in the State of New York.

While, therefore, their Lordships agree with the decision of the majority of the Court of Appeal, confirming as it does that of the trial judge, as to the earlier transaction, they are unable to follow their view of the latter one. The pith of the matter seems to be that, the powers of the provincial Legislature being strictly limited to "direct taxation within the province" (British North America Act, 30 & 31 Vict. c. 3, s. 92, sub-s. 2), any attempt to levy a tax on property locally situate outside the province is beyond their competence. This consideration renders it unnecessary to discuss the effect of the various sub-sections of s. 4 of the Succession Duty Act, on which so much stress was laid in argument. Directly or indirectly, the contention of the Attorney-General involves the very thing which the Legislature has forbidden to the province—taxation of property not within the province.

The reasoning of this Board in *Blackwood* v. *Reg.* (1) seems to cover this case.

Their Lordships will therefore humbly advise His Majesty that the appeal of the defendants should be allowed and the cross-appeal of the plaintiff dismissed, that the judgment of the Court of Appeal should be set aside with costs, and the judgment of Falconbridge, C.J., restored.

The cross-appellant will pay the costs of the appeals.

Solicitors for appellants: *Harrison & Powell.*
Solicitors for respondent: *Freshfields.*

(1) 8 App. Cas. 82.

WATTS *v.* WATTS [1908], A. C. 573.

J. C.*
1908
July 22, 30.

MARY WATTS AND THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA (INTERVENANT) . . APPELLANTS;

AND

RUBIN WATTS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Law of British Columbia—Divorce Jurisdiction of the Supreme Court.

The Supreme Court of British Columbia has jurisdiction to entertain a petition for divorce between persons domiciled in that Colony and in respect of matrimonial offences alleged to have been committed therein.

Appeal from a decree of the Supreme Court of British Columbia (November 11, 1907) dismissing the petition of Mary Watts, the appellant, for divorce and the counter-claim of the respondent for nullity of marriage on the ground of want of jurisdiction. It was filed on March 21, 1907, alleging adultery and cruelty by the respondent, who filed his answer on May 11 then next.

Clement, J., after hearing evidence, but without discussing or hearing argument on the merits, directed that argument should be made before him as to the power and jurisdiction of the said Supreme Court to grant a divorce and as to the power of one judge to hear a divorce cause, and that notice should be given to the Solicitor-General for Canada and the appellant the Attorney-General for British Columbia. In his judgment (see 13 B. C. 281) he held that the Court had no jurisdiction to grant any decree of divorce. He dissented from the decision in *S.* v. *S.*, (1877) B. C. vol. i., pt. 1, 25. Martin, J., however, subsequently dissented from the judgment of Clement, J., and granted a divorce in British Columbia in the case of *Sheppard* v. *Sheppard*, judgment in which was delivered on April 1, 1908. [1908] *A. C. p.* 574.

In the judgment appealed from Clement, J., after pointing out that there was admittedly no legislation on the subject emanating from a British Columbia Legislature before 1871, when British Columbia became a Canadian province, and none since that date, for divorce was a subject assigned exclusively to the Dominion Parliament, said

* *Present:*—LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

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that the contention was that the law of England, civil and criminal, as it existed in November, 1858, had been introduced, including its law of divorce, into the Colony by proclamation of that date. Upon this issue he held that, "so far as the Act of 1857 was limited to the creation of a Court, it was a purely local law clearly inapplicable to British Columbia. But substantive law is sometimes (e.g., in the Judicature Acts) found among the clauses of a statute, the main purpose of which is to create a Court, and to some extent that is the case in the Act of 1857 now under examination. Having created an exceptionally strong Court to take over the jurisdiction theretofore exercised by the Ecclesiastical Courts, it was deemed expedient to withdraw divorce legislation from Parliament, practically, though of course not legally, and to elevate a moral right to legislative favour into a legal right enforceable in a Court of justice. But not in any of the ordinary Courts, only in this exceptionally strong Court, and in it only when constituted in an exceptionally strong way of three judges, of whom the judge of the newly created Court of Probate was to be one. The Act did undoubtedly, I think, create a new right as between husband and wife in England, but, in my opinion, only sub modo. That new right was so inseparably incidental to and bound up with the jurisdiction of an essentially local Court that I cannot bring myself to view it as other than itself essentially local. It is impossible, in my opinion, to segregate the bare right to a judicial decree from the local conditions as to its enforcement. These local conditions did not, and could not, exist in British Columbia. Sir William Grant's description of the Mortmain Act — *Attorney-General* v. *Stewart* (1)—might well, it appears to me, be taken as a pen picture, accurate in every detail, of the Divorce and Matrimonial Causes Act of 1857: 'In its causes, its objects, its provisions, its qualifications, and its exceptions it is a law wholly English, calculated for purposes of local policy, complicated with local establishments, and incapable, without great incongruity, of being transferred as it stands into the code of any other country.' *Attorney-General* v. *Stewart* (1) was approved of and followed in the House of Lords: *Whicker* v. *Hume* (2).

[1908] *A. C.* p. 575.

"In short, I am of the opinion that the law enacted by the Divorce and Matrimonial Causes Act of 1857 was, from local circumstances, wholly incapable of application to British Columbia; and I cannot bring myself to hold that the establishment, by colonial enactment, couched in general terms, of what I may call an ordinary Court, with general jurisdiction throughout the Colony, was intended, or would suffice, to make it an extraordinary Court with the extraordinary,

(1) (1817) 2 Mer. 143, at p. 160. (2) (1858) 7 H. L. C. 124; 28 L. J. (Ch.) 396.

almost revolutionary, jurisdiction of the lately created English Divorce Court."

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Sir R. Finlay, K.C. (*J. A. Simon, K.C.*, with him), for the appellant, contended that Clement, J., had jurisdiction to grant a decree of divorce; that the English law of divorce as contained in the Acts of 1857 and 1858 was in force in British Columbia and had been uniformly applied in that Colony both before and since the decision of Clement, J. They referred to Sir James Douglas's Proclamations of November 19, 1858, and June 8, 1859, to 29 & 30 Vict. c. 67, s. 3, the English Law Ordinance, 1867 (R. S. B. C., c. 115), and the order of May 16, 1871: see Safford and Wheeler. There is no provincial or Dominion statute dealing with the divorce jurisdiction of the Court in question. They also referred to *Sharpe* v. *Sharpe* (1); *Scott* v. *Scott* (2), as to the jurisdiction of a single judge; *Sheppard* v. *Sheppard*, the judgment of Martin, J., dated April 1, 1908.

[1908] A. C. p. 576.

The respondent did not appear.

The judgment of their Lordships was delivered by

1908 *July* 30.

LORD COLLINS. The only question raised in the present appeal is whether the Supreme Court of British Columbia has jurisdiction to entertain a petition for divorce between persons domiciled in that Colony, and in respect of the matrimonial offences alleged to have been committed therein.

The Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), came into force in England on January 11, 1858, and the amending Act (21 & 22 Vict. c. 108) came into force on August 2, 1858.

On November 19, 1858, Sir James Douglas, the Governor of the Colony, published a Proclamation, intituled "A Proclamation having the force of law to declare that English law is in force in British Columbia," whereby it was enacted and proclaimed that "The civil and criminal laws of England, as the same existed at the date of the said Proclamation, and so far as they are not from local circumstances inapplicable to the Colony of British Columbia, are and will remain in full force within the said Colony till such time as they shall be altered by Her Majesty in Her Privy Council, or by me the said Governor, or by such other legislative authority as may hereafter be legally constituted in the said Colony."

At the date of the said Proclamation the law of England relating to divorce was as provided in the Acts above mentioned.

(1) (1877) 1 B. C. Rep. 25. (2) (1891) 4 B. C. Rep. 316, 318.

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By a Proclamation having the force of law, of June 8, 1859, the Supreme Court of British Columbia was constituted. The said Court was to have complete cognizance of all pleas whatsoever and to have jurisdiction in all cases, civil as well as criminal, arising within the Colony of British Columbia.

By s. 3 of the British Columbia Act, 1866 (29 & 30 Vict. c. 67), the Colony of Vancouver Island and the Colony of British Columbia were united into one Colony under the name of British Columbia.

[1908] *A. C.* p. 577.

By the English Law Ordinance, 1867, the said Proclamation of November 19, 1858, was repealed, and in lieu thereof it was enacted: "From and after the passing of this Ordinance the civil and criminal laws of England as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the Colony of British Columbia."

Then followed a provision safeguarding any modifications made by past legislation in either Colony.

By an Order in Council of May 16, 1871, the said Colony of British Columbia was admitted into and became part of the Dominion of Canada. By s. 2 of the English Law Act (Revised Statutes of British Columbia, c. 115) it was further enacted that "The Civil laws of England as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, shall be in force in all parts of British Columbia: Provided, however, that the said laws shall be held to be modified and altered by all legislation still having the force of law of the Province of British Columbia or of any former Colony comprised within the geographical limits thereof."

No statute concerning the power or jurisdiction of the said Supreme Court of British Columbia dealing with the subject of dissolution of marriage was passed by the Legislature of Vancouver or of British Columbia prior to the said May 16, 1871; nor has any statute concerning such power or jurisdiction been enacted by the Federal Parliament of the Dominion of Canada since that date.

The appellant Mary Watts was married to the respondent on October 12, 1904, at the city of Walla Walla, in the State of Washington, one of the United States of America. After the marriage she lived and cohabited with the respondent in the city of Vancouver, in the Province of British Columbia, and they have been, and at the date of the filing of the petition next hereafter mentioned were, domiciled in the said city.

On March 21, 1907, the appellant filed in the Supreme Court of British Columbia a petition for a dissolution of her marriage with

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the respondent and for alimony. The respondent filed an answer to the petition and counter-claimed for a declaration that his alleged marriage with the appellant was null and void. The cause came on for hearing on July 24 and 25, 1907, when Clement, J., having heard the evidence of the parties and their witnesses, without discussing the merits, directed that argument should be made before him as to the power and jurisdiction of the Supreme Court to grant a divorce, and as to the power of one judge to hear a divorce cause, and that the Solicitor-General for Canada and the Attorney-General for British Columbia should be served by the appellant with notice, and that the said cause should come on for further argument on October 1, 1907. Accordingly, on that day, counsel for the appellant and the respondent and the Attorney-General for British Columbia appeared, but no counsel appeared for the Solicitor-General for Canada. It was contended by all parties that the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), had, by virtue of the Proclamations and Acts above stated, operative effect in British Columbia, and that the Supreme Court of British Columbia had jurisdiction to grant divorces, and that such jurisdiction could be exercised by a single judge. On November 11, 1907, the learned judge delivered judgment, making no finding on the merits, but holding that the Supreme Court had no power or jurisdiction to grant any decree of divorce, and he ordered that the petition and counter-claim should be dismissed, and that the appellant and respondent should each pay their own costs. In arriving at this decision he refused to follow a decision of the Full Court, in which it was held by two judges, the Chief Justice dissenting, that the jurisdiction exists and could be exercised by a single judge.

[1908] *A. C.* *p.* 578.

On February 29, 1908, by Order in Council of that date, leave to appeal was given to the petitioner, Mary Watts, and to the Attorney-General for the Province of British Columbia leave to join in the appeal as co-appellant, and it was further ordered that the Attorney-General for the Dominion of Canada should be allowed to intervene in the said appeal.

Since the decision in *S.* v. *S.* (1) jurisdiction in divorce cases has been uniformly exercised by single judges of the Supreme Court in British Columbia, and in *Scott* v. *Scott* (2) the question was again debated before the Full Court of three judges, including the Chief Justice, who had dissented in the former case. In delivering the judgment Begbie, C.J., says: "We have neither the power nor the inclination to discuss the decision in *S.* v. *S.* or to impugn it in any way."

[1908] *A. C.* *p.* 579.

(1) (1877) B. C. vol. i., pt. 1, p. 25.

(2) 4 B. C. Rep. 316.

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Since the decision of the present case by Clement, J., Martin, J., in the case of *Sheppard* v. *Sheppard*, decided April 1, 1908, has refused to follow it, and has given his reasons at length in a very able and elaborate judgment, tracing the evolution of divorce jurisdiction in the Colony back to its first beginnings and removing some apparent misapprehensions on the part of Clement, J., as to the attitude of Begbie, C.J., towards this jurisdiction after the decision in *S.* v. *S.*

In the opinion of their Lordships, the reasons given in the judgments of Gray and Crease, JJ., in *S.* v. *S.*, together with the recent critical survey of the ultimate situation by Martin, J., in *Sheppard* v. *Sheppard*, place the question beyond discussion, and it seems to their Lordships, with all deference to Clement, J., that his opinion to the contrary cannot be supported.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, the judgment appealed from set aside, and the case remitted to the Supreme Court to be decided on the merits.

There will be no order as to the costs of the appeal.

Solicitors for appellant: *Gard, Rook & Co.*

J. C.* 1908 *July* 7, 8; *Oct.* 16.

LA COMPAGNIE HYDRAULIQUE *v.* CONTINENTAL HEAT CO. [1909], A. C. 194.

LA COMPAGNIE HYDRAULIQUE DE ST. FRANÇOIS . . . . . } APPELLANTS;

AND

CONTINENTAL HEAT AND LIGHT COMPANY AND ANOTHER . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Dominion Act 60 & 61 *Vict. c.* 72—*Quebec Act* 4 *Edw.* 7, *c.* 84, *s.* 3—*Dominion overrides Provincial Legislation.*

Where a given field of legislation is within the competence both of the Dominion and provincial Legislatures, and both have legislated, the Dominion enactment must prevail:—

Held, accordingly, that the respondent company, which under Dominion Act 60 & 61 Vict. c. 72 was empowered to supply, sell, and dispose of gas and electricity, with other powers, could not be restrained from operating thereunder at the suit of the appellants, who under later Quebec statutes had exclusive power of so operating in the locality chosen by the respondents.

* *Present*:—LORD ROBERTSON, LORD ATKINSON, SIR ARTHUR WILSON, and SIR HENRI ELZÉAR TASCHEREAU.

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LA COMPAGNIE HYDRAULIQUE DE ST. FRANÇOIS *v.* CONTINENTAL HEAT AND LIGHT COMPANY.

Appeal from a judgment of the above-mentioned Court (May 4, 1907) affirming a judgment of the Superior Court at Arthabaska (November 13, 1906) and dismissing the appellants' action and petition for injunction.

The appellants were incorporated by Quebec statutes 2 Edw. 7, c. 76, and 4 Edw. 7, c. 84, and were granted the privilege of producing and selling electricity as power, heat, and light within a radius of thirty miles from the village of Disraeli, in Quebec. Sect. 3 of the later Act is set out in their Lordships' judgment. The respondents were incorporated under a Dominion Act, 60 & 61 Vict. c. 72, ss. 7 and 8 of which defined their powers, which included that of manufacturing, supplying, selling, and disposing of gas and electricity. Sect. 8 empowered them, with the consent of the municipal council or other authority having jurisdiction over any highway or public place, to enter thereon for the purpose of making the necessary constructions and suitable electrical contrivances. Both companies erected buildings and installed plant and machinery to produce and distribute electrical power within the said thirty miles' radius.

[1909] *A. C.* *p.* 195.

On an action by the appellants for damages and an injunction the Superior Court held that 4 Edw. 7, c. 84, s. 3, is a clause contained in an Act of a local and private nature, which by art. 9 of the Civil Code could not affect the rights of third parties not therein specially mentioned, the same provision being contained in the Provincial Interpretation Act (Quebec Act 49 & 50 Vict. c. 95), s. 14; that the respondent company's charter was in existence when the charter of the appellants was enacted and amended; that the clause relied upon did not grant a privilege, but, if anything, made a restriction upon charters of other companies, and it is not mentioned therein that the privileges granted to the respondent company by Dominion Act 60 & 61 Vict. c. 72 are affected by that Act, nor is that Act affected by 4 Edw. 7, c. 84, nor is the respondent company excluded from the right of making and selling electricity within the territory in question.

H. T. Taschereau, C.J., delivered the judgment of the majority of the Appellate Court (Blanchet, J., dissenting). They dismissed the appeal on the ground that there was no error in the judgment of the Court below, and held in substance that a federal charter confers not only legal existence on the company it incorporates, but gives it inherent rights and powers of a general kind which cannot be subsequently affected, limited, or changed by provincial legislation, and the federal charter being intra vires the Parliament of Canada, it was not possible to say that it could be affected by

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[1909] *A. C. p.* 196.

the appellants' charter afterwards obtained. Even if the respondent company's charter had been a provincial instead of a federal one, he did not think that it could be claimed that its general powers were affected by such a clause as that contained in 4 Edw. 7, c. 84, s. 3, which was an Act of a purely private nature and did not mention the respondent company. He relied on the decision in the case of *Toronto Corporation* v. *Bell Telephone Co. of Canada* (1).

Blanchet, J., considered that the Act in question should be considered to be a private Act. The prohibition contained in it affected not only electric companies, but all covered by 2 Edw. 7, c. 76, and as it was impossible to describe them, it became necessary to say in general language that they should not operate in the territory designated in the Act without the consent of the appellants and the other companies named in the Act. The two cases of *Citizens' Insurance Co.* v. *Parsons* (2) and *Colonial Building, &c. Association* v. *Attorney-General of Quebec* (3) established that an incorporated company can only exercise its powers in each province subject to the laws in force in that province. As the province of Quebec did not possess coal mines, its water powers were of great importance and formed an integral part of the immovable property of the province, and consequently fell under the exclusive control of the Legislature of the province, which, in granting charters for the exploitation of these water powers, had the indubitable right to prescribe conditions which would favour their rapid development. He also considered that the right of the respondent company to exercise its powers upon the highways with the consent of the municipalities was not in the nature of a vested right, and that the municipal authorities' power to consent being derived from the Legislature, it could be taken away from them, and that, in substance, the effect of the statute in question was to do this.

Sir R. Finlay, K.C., and *Panneton*, for the appellants, contended that this judgment should be reversed and that the judgment of Blanchet, J., was right. The object of the Dominion statute was to incorporate the respondent company and clothe it with the necessary powers to carry on its business. It was neither its intention nor its effect, according to its true construction, to confer on the respondent company any right to disregard the special privileges of the appellants. Those privileges had been granted by competent legislative authority acting within its local jurisdiction. The power to incorporate a company for provincial objects is

(1) [1905] A. C. 52, *ante*, p. 617. (2) (1881) 7 App. Cas. 96, 113, *ante*, p. 267.
(3) (1883) 9 App. Cas. 157, *ante*, p. 349.

specifically given to the provincial Legislature by British North America Act, 1867, s. 92, sub-s. 11, and cannot be overborne by a Dominion Act passed subsequently to the provincial Act. Under such circumstances the Dominion legislation must be subject to existing rights under provincial legislation and should be so construed as not to interfere with them unless their owners consented. According to the true construction of 4 Edw. 7, c 84, the appellants' consent was necessary to legalize the acts of the respondents. They had not, however, obtained that consent, and there was nothing in the Dominion statute which absolved them from so doing or rendered such consent unnecessary to the validity of their proceedings. They referred to British North America Act, 1867, s. 91, sub-s. 29, and s. 92; *Citizens' Insurance Co.* v. *Parsons* (1), where it was held that the local law must prevail as to the conditions on which insurance business should be carried on; *Colonial Building, &c. Association* v. *Attorney-General of Quebec* (2); *Hull Electric Co.* v. *Ottawa Electric Co.* (3); *Toronto Corporation* v. *Bell Telephone Co. of Canada* (4), where the objects of the company were very different from those now in question; *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (5). The Dominion has the power to incorporate for all purposes with the exception of those which are specially confided to the province.

Lafleur, K.C., and *MacDougall, K.C.*, for the respondents, were not heard.

On July 8 their Lordships agreed to report to His Majesty that the appeal should be dismissed.

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Oct. 16.

The reasons for the report were delivered by

Sir Arthur Wilson. A statute, 60 & 61 Vict. c. 72, of the Parliament of Canada incorporated the respondent company and enacted that (s. 7) it might manufacture, supply, sell, and dispose of gas and electricity, with other powers.

Subsequent provincial statutes of Quebec incorporated the appellant company and granted it the exclusive privilege of producing and selling electricity within a radius of thirty miles from the village of Disraeli, in the province of Quebec. [1909] *A. C. p.* 198.

The statute further enacted that "No company shall exercise any privileges, franchises, or rights of a like nature to those conferred upon the St. Francis Water Power Company by the Act 2 Edward VII., chapter 76, in the territory designated in the said

(1) 7 App. Cas. 96, 113, *ante*, p. 267.
(2) 9 App. Cas. 157, *ante*, p. 349.
(3) [1902] A. C. 237.
(4) [1905] A. C. 52, *ante*, p. 617.
(5) [1907] A. C. 65, *ante*, p. 636.

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Act without first obtaining the consent of the said St. Francis Water Power Company, and that of the companies mentioned in the following clause."

The respondents took steps to act under their charter by establishing works within thirty miles from Disraeli. The appellants applied for an injunction to restrain them from so doing. The Courts in Canada refused the injunction, and against that refusal the present appeal has been brought.

The contention on behalf of the appellant company was that the only effect of the Canadian Act was to authorize the respondent company to carry out the contemplated operations in the sense that its doing so would not be ultra vires of the company, but that the legality of the company's action in any province must be dependent on the law of that province.

This contention seems to their Lordships to be in conflict with several decisions of this Board. Those decisions have established that where, as here, a given field of legislation is within the competence both of the Parliament of Canada and of the provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province if the two are in conflict, as they clearly are in the present case.

For these reasons their Lordships on July 8 last agreed humbly to advise His Majesty that the appeal should be dismissed, and directed the appellants to pay the costs of it.

Solicitors for appellants: *Stibbard, Gibson & Co.*
Solicitors for respondents: *Lawrence Jones & Co.*

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July 19, 21, 29.

CANADA *v.* ONTARIO (INDIAN ANNUITIES)

[1910] A. C. 637.

DOMINION OF CANADA . . . . . PLAINTIFF;

AND

PROVINCE OF ONTARIO . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Treaty of October 3, 1873, extinguishing the Indian Interest in Lands—Payments by the Dominion under the Treaty—Suit by the Dominion against the Province of Ontario for Contribution as respects Lands within the Province.

By a treaty dated October 3, 1873, the Dominion Government, acting in the interests of the Dominion as a whole, secured to the Salteaux tribe of the

* *Present:*—LORD LOREBURN, L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

Ojibeway Indians certain payments and other rights, at the same time extinguishing by consent their interest over a large tract of land about 50,000 square miles in extent, the greater part of which was subsequently ascertained to lie within the boundaries of the Province of Ontario. It having been decided that the release of the Indian interest effected by the treaty enured to the benefit of Ontario, the Dominion Government sued in the Exchequer Court for a declaration that it was entitled to recover from and be paid by the Province of Ontario a proper proportion of annuities and other moneys paid and payable under the treaty:—

Held, affirming the judgment of the Supreme Court, that, having regard to the jurisdiction conferred upon the Exchequer Court, the action must be dismissed as unsustainable on any principle of law. In making the treaty, although it resulted in direct advantage to the province, the Dominion Government did not act as agent or trustee for the province or with its consent, or for the benefit of the lands, but with a view to great national interests—that is, for distinct and important interests of their own—in pursuance of powers derived from the British North America Act, 1867.

St. Catherine's Milling and Lumber Co. v. *The Queen*, (1888) 14 App. Cas. 46, considered (*ante*, p. 390).

Appeal by special leave from a judgment of the Supreme Court (February 12, 1909) which reversed a judgment of Burbidge, J., in the Exchequer Court of Canada (March 18, 1907) and dismissed the appellant's suit.

The jurisdiction of the Exchequer Court to decide the controversy in suit between the Dominion and the province was conferred by R. S. C., 1906, c. 140, s. 32, and R. S. O., 1897, c. 49, s. 1.

[1910] *A. C.* *p.* 658.

By the statement of the Dominion of Canada filed in the Exchequer Court on June 13, 1903, the claimant set forth that by a treaty No. 3, known as the North West Angle Treaty, and dated October 3, 1873, between Her late Majesty Queen Victoria by her Commissioners therein named of the one part, and the Salteaux tribe of the Ojibeway Indians of the other part, the said Indians ceded, released, surrendered, and yielded up to the Government of the Dominion for Her Majesty the Queen and her successors for ever all their rights, titles, and privileges whatsoever to the lands thereinafter mentioned, such lands embracing an area of 55,000 square miles more or less, to hold the same to Her Majesty the Queen and her successors for ever. And Her Majesty the Queen thereby agreed and undertook to lay aside reserves of lands in the territories thereby ceded for the benefit of the Indians as therein mentioned, and further to give to her Indians certain presents of money, and also annually to pay to them certain annuities and to give to them certain presents and sums of money for the chiefs and subordinate officers as therein mentioned. And Her Majesty also entered into further agreements with her said Indians as therein mentioned.

The claimant also set forth that in pursuance of the treaty the

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Dominion had made payments to and for the benefit of the Indians in accordance with its provisions, the details of which were set out in schedules A and B to the said statement, and that the Dominion had also been obliged to make large expenditures of money in making surveys of reserves for the Indians and in conducting the necessary business of the administration of the treaty, the details of which expenditure were set forth in schedule C thereto. Also that after the admission into the Union of the Province of Manitoba in the year 1870 a dispute arose between the Dominion and the Province of Ontario as to the correct northern and western boundary of the said Province of Ontario, and that, arbitrators having been appointed to determine the correct boundary, an award was made, by the effect of which out of the 55,000 square miles within the limits of the treaty about 30,000 square miles were found to be within the boundary of the Province of Ontario. Subsequently, in the year 1888, in an action brought by the Attorney-General of Ontario against the St. Catherine's Milling and Lumber Company, Limited, the Judicial Committee of the Privy Council decided that the portion of the ceded lands found by the Court to be within Ontario formed part of the public domain of Ontario, and were public lands belonging to Ontario by virtue of the provisions of the British North America Act, and the claim that the said lands were the property of the Dominion by reason of the cession of the Indian title to the Dominion was dismissed.

[1910] *A. C.* *p.* 639.

The claim of the Dominion of Canada was for a declaration that (1.) inasmuch as the benefit of the aforesaid surrender accrues to Ontario, that province shall relieve the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty by virtue of the said treaty, and which have been, or may be, fulfilled by the Dominion of Canada; (2.) the Province of Ontario has held, and now holds, the portion of the ceded lands which lie within the province charged with and subject to the payment of a proportion of the annuities and other moneys paid to and for the Indians under the terms and stipulations of the treaty; (3.) the Dominion of Canada is entitled to recover from, and be paid by, the Province of Ontario a proper proportion of annuities and other moneys so paid as aforesaid; (4.) all proper accounts be taken to ascertain the amount payable to the Dominion in respect of the said annuities and other moneys so paid as aforesaid.

By its answer the Province of Ontario denied liability, and, further, counterclaimed in respect of certain revenues received by the Dominion pending a determination of the boundaries of

the province and arising out of the lands eventually adjudged to belong to the province.

The judgment of the Judicial Committee in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1) decided that the surrender of so much of the area of 55,000 square miles as was situated in the Province of Ontario enured to transmit to the province in terms of s. 109 of the British North America Act, 1867, the entire beneficial interest in such lands, and in the course of the judgment there occurred this passage (2): "Seeing that the benefit of the surrender accrues to her, Ontario must of course relieve the Crown and the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government."

[1910] A. C. p. 640.

Burbidge, J., by his judgment declared the province liable to pay to the Dominion all such sums paid by the Dominion as were referable to the extinguishment of the Indian title, in the proportion which the area of the treaty lands within Ontario bears to the whole treaty area. All other questions, including the question what sums of money so paid by the Dominion were referable to the extinguishment of the Indian title, were reserved for further consideration and adjudication. He considered that, with respect to that portion of the lands surrendered to the Crown which were situated within the province, "the Dominion Government occupied a position analogous to that of a bona fide possessor or purchaser of lands of which the actual title was in another person. The question of the extinguishment of the Indian title in these lands could not with prudence be deferred until such boundaries were determined. It was necessary to the peace, order, and good government of the country that the question should be settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion and that they had a right to administer the same. In this they were in a large measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiations for the treaty without consulting the province. The latter, although it claimed the lands to be surrendered or the greater part thereof, raised no objection and did not ask to be represented in such negotiations. The case bears some analogy to one in which a person in consequence of unskilful survey or in the belief that the land is his own makes improvements in lands that are not his own. In such a case the statutes of the old Province of Canada made, and those of the Province of Ontario make, provision to protect him from loss in respect of such improvements or to give him a lien therefor. The case,

[1910] A. C. p. 641.

(1) 14 App. Cas. 46, *ante*, p. 390. (2) 14 App. Cas., *ante*, p. 400.

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however, appears to me to bear a closer analogy to one in which a bona fide possessor or purchaser of real estate pays money to discharge an existing incumbrance or charge upon the estate having no notice of any infirmity in his title. In such a case, as stated by Mr. Justice Story in *Bright* v. *Boyd* (1), the possessor or purchaser was according to the principles of the Roman law entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him." He also considered that the views expressed in Lord Watson's judgment (2) should be taken as a part or condition of the judgment in favour of the province, and that, although such views found no place in the formal judgment pronounced, it was proper that he should give effect to the view there expressed that the Province of Ontario was liable to indemnify the Dominion against a portion of the expenditure incurred in discharge of the obligations created by the treaty.

The judgment on further consideration (December 4, 1907) referred it to the registrar to take certain accounts necessary to give effect to the declaration.

Both judgments were reversed by the Supreme Court by a majority of one (Idington, Maclennan, and Duff, JJ., Girouard and Davies, JJ., dissenting).

The judgment of the majority dealt first with the scope of the jurisdiction of the Court of Exchequer, to which Court, by identical statutes, the Dominion and the province had committed jurisdiction over controversies between them, and held that the statutes in question required any controversy submitted under them to be determined in accordance with and by the application of legal principles, and not by considerations of mere convenience and propriety.

Idington, J., held that there was no foundation in law or fact for the theory that the Dominion acted as an agent for the province, but that the Dominion was impelled to settle with the Indians by virtue of its obligations to the Province of British Columbia, and for other reasons not referable to its wardship over or duties towards such Indians; and that the pronouncement in Lord Watson's judgment in 14 App. Cas. 60 was a mere dictum.

[1910] *A. C.* *p.* 642.

Duff, J., with whose opinion Maclennan, J., concurred, agreed with Idington, J., as to the motives of the Dominion in making the treaty, and considered that under these circumstances there was no principle on which a Court of Equity could proceed to adjust equitably as between the Dominion and the province the burden of the obligations

(1) (1841) 1 Story's Reports, 479, 498. (2) 14 App. Cas. 60, *ante*, p. 400.

undertaken by the former; that Lord Watson's remark was a mere dictum, the preferable view of its import being that, upon the facts as they appeared, as a matter of fair dealing Ontario would be expected to assume the obligations in question, but that, in deciding controversies between the two Governments, the Exchequer Court could only apply some appropriate rule or principle of law, and that the pronouncement, even if more than a mere dictum, would not be conclusive of the appeal before them.

Newcombe, *K.C.*, and *Clauson*, for the appellant, contended that the judgment of Burbidge, J., whose decision was upheld by the dissenting judges in the Supreme Court, was right. The case was concluded by the authority of the principle laid down by Lord Watson's judgment in 14 App. Cas. 46. The majority of the Supreme Court recognized that the claim of the Dominion was naturally equitable, and that the province which obtained the benefits of the treaty, so far as it affected the lands in which it had the beneficial interest, should bear the burdens which the treaty imposed thereon. It was unnecessary to resort to any technical rule of law or equity as laid down by authority. It had been a public duty devolving on the Dominion to extinguish the Indian title; and it discharged that duty for the benefit of all concerned. The resulting burdens should be adjusted in proportion to the benefits accepted. It was contended that the Crown in right of the Dominion represented the union of all the provinces and that payment by the Dominion was payment by all the provinces jointly. If the sole benefit of a particular treaty provision made by the Dominion enured to the exclusive benefit of one province only, the resulting liability should be borne by that province and not shared by the other provinces which did not participate in the accruing advantages. The principle invoked by the Dominion in this case was that the obligations and liability incurred to obtain the surrender of the Indian title were in effect a commutation of the burden of that title upon the lands, and as such remain a charge upon the lands. In such a case as this no distinction should be drawn between the Crown acting in right of the Dominion and the Crown acting in right of the province. If a distinction can be made, it should be held that the Dominion acted in obtaining the treaty and freeing the lands from the Indian title, so far as regards the lands situated within the province, as agent for the province. The benefits secured by the treaty passed to the province upon the acceptance by the province of the lands surrendered. By that acceptance the province accepted also the liabilities which the

[1910] A. C. p. 643.

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treaty created in respect thereof. Even if no principle of municipal law could be found applicable, the case should be governed on such principles of equity and fairness as regulate the respective rights and obligations of distinct and independent States, and by those principles a State accepting advantages under a public treaty must bear the liabilities involved thereby, thus accepting the treaty as a whole. It cannot accept such portion as is in its favour and repudiate the liability which acceptance involves and ratifies. Reference was made to the judgment of Strong, C.J., in *Province of Ontario* v. *Dominion of Canada, In re Indian Claims* (1), and to *Attorney-General for the Dominion* v. *Attorney-General for Ontario* (2); *Ontario Mining Co.* v. *Seybold* (3); *Johnson* v. *M'Intosh* (4); *Worcester* v. *State of Georgia* (5); *Mitchell* v. *United States* (6).

C. H. Ritchie, K.C., and *Shepley, K.C.*, for the respondent, were not heard.

1910
July 29.

The judgment of their Lordships was delivered by

[1910] *A. C.* p. 644.

LORD LOREBURN, L.C. In this appeal the only question argued was whether or not the Dominion of Canada is entitled to recover from the Province of Ontario a proper proportion of annuities and other moneys which the Dominion bound itself in the name of the Crown to pay to an Indian tribe and its chiefs under a treaty of October 3, 1873. There has been a marked difference of opinion in the Canadian Courts. Burbidge, J., decided in favour of the Dominion, but on appeal to the Supreme Court of Canada three out of five learned judges reversed that judgment. The various opinions delivered in both Courts have dealt with the case so exhaustively and so clearly that nothing new really remains to be said, and the matter at issue has been reduced to a simple though extremely important point.

The treaty of 1873 was made between Her late Majesty Queen Victoria, acting on the advice of the Dominion Government, and the Salteaux tribe of the Ojibeway Indians. Its effect was to extinguish by consent the Indian interest over a large tract of land about 50,000 square miles in extent, and in return it secured to the Indians certain payments and other rights agreed to and promised by Her Majesty. At that time it had not been ascertained whether any part of this land was included within the Province of Ontario, but it is now common ground that the greater part of it lies within the

(1) (1895) 25 Can. S. C. R. 434, 505.
(2) [1897] A. C. 199, 210.
(3) [1903] A. C. 73, *ante*, p. 584.
(4) (1823) 8 Wheaton (21 U. S. 543.
(5) (1832) 6 Peters (31 U. S.) 515.
(6) (1835) 9 Peters (34 U. S.) 711.

Ontario boundaries. In making this treaty the Dominion Government acted upon the rights conferred by the Constitution. They were not acting in concert with the Ontario Government, but on their own responsibility, and it is conceded that the motive was not any special benefit to Ontario, but a motive of policy in the interests of the Dominion as a whole.

When, however, by subsequent decisions it was established that, under the British North America Act of 1867, lands which are released from the overlying Indian interest enure to the benefit, not of the Dominion, but of the province within which they are situated, it became apparent that Ontario had derived an advantage under the treaty. And the principle sought to be enforced by the present appeal is that Ontario should recoup the Dominion for so much of the burden undertaken by the Dominion toward the Salteaux tribe as may properly be attributed to the lands within Ontario which had been disencumbered of the Indian interest by virtue of the treaty.

[1910] A. C. p. 645.

Their Lordships are of opinion that in order to succeed the appellants must bring their claim within some recognized legal principle. The Court of Exchequer, to which, by statutes both of the Dominion and the province, a jurisdiction has been committed over controversies between them, did not thereby acquire authority to determine those controversies only according to its own view of what in the circumstances might be thought fair. It may be that, in questions between a dominion comprising various provinces of which the laws are not in all respects identical on the one hand, and a particular province with laws of its own on the other hand, difficulty will arise as to the legal principle which is to be applied. Such conflicts may always arise in the case of States or provinces within a union. But the conflict is between one set of legal principles and another. In the present case it does not appear to their Lordships that the claim of the Dominion can be sustained on any principle of law that can be invoked as applicable.

To begin with, this case ought to be regarded as if what was done by the Crown in 1873 had been done by the Dominion Government, as in substance it was in fact done. The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively.

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So regarding it, there does not appear sufficient ground for saying that the Dominion Government in advising the treaty did so as agent for the province. They acted with a view to great national interests, in pursuance of powers derived from the Act of 1867, without the consent of the province and in the belief that the lands were not within that province. They neither had nor thought they required nor purported to act upon any authority from the Provincial Government.

[1910] *A. C.* p. 616.

Again, it seems to their Lordships that the relation of trustee and cestui que trust, from which a right to indemnity might be derived, cannot, even in its widest sense, be here established. The Dominion Government were indeed, on behalf of the Crown, guardians of the Indian interest and empowered to take a surrender of it and to give equivalents in return, but in so doing they were not under any special duty to the province. And in regard to the proprietary rights in the land (apart from the Indian interest) which through the Crown enured to the benefit of the province, the Dominion Government had no share in it at all. The only thing in regard to which the Dominion could conceivably be thought trustees for the province, namely, the dealing with the Indian interest, was a thing concerning the whole Canadian nation. In truth, the duty of the Dominion Government was not that of trustees, but that of ministers exercising their powers and their discretion for the public welfare.

Another contention was advanced on behalf of the appellants —that this is analogous to the case of a bona fide possessor or purchaser of real estate who pays money to discharge an existing incumbrance upon it without notice of an infirmity of his title. It is enough to say that the Dominion Government were never in possession or purchasers of these lands, that they had, in fact, notice of the claim thereto of the true owner, though they did not credit it, and that they did not pay off the Indian incumbrance for the benefit of these lands, but for distinct and important interests of their own.

This really is a case in which expenditure independently incurred by one party for good and sufficient reasons of his own has resulted in direct advantage to another. It may be that, as a matter of fair play between the two Governments, as to which their Lordships are not called upon to express and do not express any opinion, the province ought to be liable for some part of this outlay. But in point of law, which alone is here in question, the judgment of the Supreme Court appears unexceptionable.

If the opinions of Burbidge, J., and of the two dissenting judges in the Supreme Court are examined, it will be found that they

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[1910] A. C. p. 647.

rely almost entirely upon a passage in the judgment delivered by Lord Watson at this Board in the case of *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1). It must be acknowledged that this passage does give strong support to the view of those who rely upon it, and their Lordships feel themselves bound to regard this expression of opinion with the same respect that has been accorded to it by all the learned judges in Canada. They consider, however, that Idington, J., and Duff, J., have stated conclusive reasons against adopting the dictum alluded to as decisive of the present case. The point here raised was not either raised or argued in that case, and it is quite possible that Lord Watson did not intend to pronounce upon a legal right. If he did so intend, the passage in question must be regarded as obiter dictum.

In the course of argument a question was mooted as to the liability of the Ontario Government to carry out the provisions of the treaty so far as concerns future reservations of land for the benefit of the Indians. No such matter comes up for decision in the present case. It is not intended to forestall points of that kind which may depend upon different considerations, and, if ever they arise, will have to be discussed and decided afresh.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to costs.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondent: *Freshfields.*

BURRARD POWER CO. *v.* THE KING [1911], A. C. 87.

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July 20, 21
Nov. 1.

BURRARD POWER COMPANY, LIMITED AND ANOTHER . . . . . } DEFENDANTS;

AND

THE KING . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British Columbian Water Clauses Consolidation Act (61 *Vict. c.* 190), *s.* 4—*Grant of Water Rights in Public Lands conveyed to the Dominion—Provincial Legislation relating thereto ultra vires.*

Certain water rights in lands known as the Railway Belt for British Columbia were granted to the appellants by Water Commissioners who purported

* *Present:*—LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

(1) 14 App. Cas. 60, *ante*, p. 390.

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to act under the British Columbian Water Clauses Consolidation Act, 1897 (61 Vict. c. 190), s. 4.

On an information filed by the Dominion claiming that the grant was invalid and conveyed no interest to the appellants:—

Held, that (1.) the Railway Belt having been conveyed by the Province to the Dominion by provincial statutes for railway purposes as contemplated by the 11th article of the Terms of Union, it resulted that the proprietary rights therein, which before the transfer belonged to the Crown in right of the Province, after the transfer belonged to the Crown in right of the Dominion for a public purpose; (2.) being public lands both before and after the transfer, they were public property within the meaning of s. 91 of the British North America Act, 1867, and as such were under the exclusive legislative authority of the Dominion Parliament; (3.) the above Water Clauses Consolidation Act could not affect the waters upon those lands and on its true construction (see s. 2) did not purport to do so.

Appeal by special leave from a judgment of the Supreme Court of Canada (February 15, 1910) affirming a judgment of the Exchequer Court of Canada (May 10, 1909) which declared that a grant dated April 7, 1906, by the Water Commissioners for the district of New Westminster, British Columbia, to the appellants of a record of 25,000 inches of water out of the Lillooet Lakes and River and their tributaries was invalid and conveyed no interest to them.

The judgment also declared that the grant be cancelled (1.) as being an interference with property subject to the exclusive authority of the Dominion of Canada; (2.) because the outflow of water intended to be authorized thereunder would be a very serious interference with the navigability of the river; and (3.) because the said record was not authorized by or under the provisions of the statute of British Columbia Water Clauses Consolidation Act, 1897; and ordered accordingly.

[1911] *A. C.* *p.* 88.

The question decided was as to the rights of the Dominion in lands known as the Railway Belt of British Columbia, and specifically whether the water rights therein were vested in the Dominion by force of a grant from the Government of British Columbia.

By Order in Council (May 16, 1871) British Columbia was admitted into the Dominion of Canada subject to the provisions of British North America Act, 1867, and to the Terms of Union between the Dominion and the Province which became effective under s. 146 of that Act, the 11th article of which Terms of Union is as follows:—

"The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further,

to secure the completion of such railway within ten years from the date of the union.

"And the Government of British Columbia agree to convey to the Dominion Government, in trust to be appropriated in such manner as the Dominion Government may deem advisable in the furtherance of the construction of the said railway, a similar extent of public lands along the line of railway, throughout its entire length in British Columbia, not to exceed however twenty (20) miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-West Territories and the Province of Manitoba. Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands, and provided further that until the commencement within two years, as aforesaid, from the date of the union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the union, the sum of 100,000 dollars per annum in half-yearly payments in advance."

[1911] A. C. p. 89.

The grant of the said lands known as the Railway Belt was effected by British Columbia Act 43 Vict. c. 11, amended by 46 Vict. c. 14, s. 2, and 47 Vict. c. 14, s. 2. Thereafter the provincial Chief Commissioner of Land and Works, purporting to act under s. 136 of the provincial Water Clauses Consolidation Act, 1897 (R. S. 1897, c. 190), issued a notice reserving for industrial powers all unrecorded waters in a described area, which included the Lillooet Lake and River; and the appellants obtained under the same Act the grant of water rights on which they relied. Upon an information by the Attorney-General of Canada the Supreme Court held that while the Railway Belt was vested by the said grant in the Dominion the Water Commissioners of the Province were incompetent to make grants of water records under the said provincial Act of 1897, which would in the operation of the powers thereby conferred interfere with the proprietary rights of the Dominion therein.

Idington, J., rested his opinion "on the broad right of the Dominion to the use of the water, and issue raised in regard to it, which is no doubt what the parties desire to have determined, rather than upon the narrow one of the possible interference with navigation, which

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must depend upon facts. These once ascertained as shewing interference with navigation, the Dominion's right is undoubted."

Duff, J., with whom Fitzpatrick, C.J., and Davies, J., concurred, considered that "the true view of the 11th article (referring to the Terms of Union) is that the power to deal with and manage the tract of land to be transferred by the Dominion thereunder is vested in the Dominion, and that as a consequence the Province could neither assume any part of the land so vested in the Dominion for itself, nor dismember the Dominion's proprietary rights in it by conferring any such rights upon others."

Anglin, J., held it to be manifest that the diversion of the water proposed by the appellant would seriously interfere with, if not destroy, the navigation of the Lillooet River; that "by s. 91 (10.) of the British North America Act, 1867, legislative jurisdiction over navigation is vested exclusively in the Dominion Parliament, and it has prohibited the erection of any dam which shall interfere with navigation (R. S. C., 1906, c. 116, s. 4). Because the carrying out of the scheme of the appellants will involve the construction of a dam which will interfere with navigation, I am of opinion that the judgment in appeal should be sustained." He also held that the provincial grant was an unauthorized interference with the property and incidental rights of the Dominion.

Girouard, J., considered that the Court was bound by its previous decision in *Queen* v. *Farwell* (1) and that the appeal should be dismissed on that ground.

Lafleur, K.C., and *Hamar Greenwood*, for the appellants, contended that the grant of the Railway Belt effected by the provincial Act of 1880 and its amendments did not pass the water rights to the Dominion Government and did not vest the lands in them as public property within the meaning of s. 91, sub-s. 1, of the British North America Act, 1867. In *Attorney-General of British Columbia* v. *Attorney-General of Canada* (2), a case which related to precious metals, it was held that the said Acts merely transferred to the Dominion the provincial right to administer and dispose of the lands and appropriate their revenues. The Railway Belt was conveyed to the Dominion subject to the provincial law affecting the Crown lands of the Province, and the provincial Legislature retained the right to legislate in regard to it, and especially in regard to the water rights therein. As regards the water rights the grant effected by the Acts should be construed not merely in reference to the then existing law, but as subject to future provincial legislation. Accordingly the Water

(1) (1887) 14 Can. S. C. R. 392. (2) (1889) 14 App. Cas. 295, *ante*, p. 403.

Privileges Act, 1892, and the Water Clauses Consolidation Act, 1897, which confirmed Crown rights in British Columbia as to water, operated on the lands the subject of the grant. Further it was contended that the lands in the Railway Belt did not constitute "property" within the meaning of s. 91 before cited. Reference was made to *Macgregor* v. *Esquimalt and Nanaimo Ry. Co.* (1) and *Esquimalt Water Works Co.* v. *City of Victoria Corporation* (2); to the British Columbia Ordinance of 1865, s. 44; its Land Ordinance of 1870 (33 Vict., No. 134), s. 30, and its Land Act, 1875 (38 Vict., No. 5), ss. 48 and 54, which limited the common law rights of riparian proprietors in British Columbia; to the Water Privileges Act (55 Vict. c. 47), s. 2, and the Consolidation Act of 1897 (61 Vict. c. 190, R. S. B. C.), ss. 4 and 5, and s. 2 (interpretation).

Newcombe, *K.C.*, and *A. D. Bateson*, for the respondent, were not heard.

1910
Nov. 1.

The judgment of their Lordships was delivered by

LORD MERSEY. This is an appeal, by special leave, from the judgment of the Supreme Court of Canada, affirming a judgment of the Exchequer Court of Canada rendered on May 10, 1909.

The only question raised upon the appeal is whether certain water rights in the Railway Belt of British Columbia are vested in the Dominion Government so as to preclude the provincial Legislature from dealing with them. The circumstances in which the dispute has arisen are shortly as follows. The Province of British Columbia was admitted into the Dominion of Canada in the year 1871 under the provisions of the British North America Act, 1867. The admission was subject to the provisions of that Act and also to certain Articles of Union duly sanctioned by the Parliament of Canada and by the Legislature of British Columbia. The 11th of these articles stipulated that the Dominion Government should secure the construction of railway communication between the railway system of Canada and the seaboard of British Columbia, and that the Government of British Columbia should convey to the Dominion Government, "in trust to be appropriated in such manner as the Dominion Government may deem advisable in the furtherance of the construction of the said railway," certain public lands along the line of railway throughout its entire length in British Columbia. In consideration of the land to be so conveyed in aid of the construction of the said railway the Dominion Government agreed to pay to British Columbia from the

[1911] *A. C.* *p.* 92.

(1) [1907] A. C. 462, 468, *ante*, p. 647. (2) [1907] A. C. 499, 509.

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date of the union the sum of $100,000 per annum. The conveyance contemplated by this part of the 11th article was effected by subsequent statutes of the Legislature of the Province, and the land so conveyed is known as the "Railway Belt." The railway has now been built.

By the Water Clauses Consolidation Act, 1897 (61 Vict. c. 190, Revised Statutes of British Columbia), s. 4, the right to the use of the unrecorded water in any river, lake, or stream was declared to be vested in the Crown in the right of the Province, and it was enacted that save in the exercise of any legal right existing at the time of such diversions or appropriation no person should divert or appropriate any water from any river, watercourse, lake, or stream, excepting under the provisions of the Act. By s. 5 it was provided that no right to the exclusive use of such water should be acquired by any person by length of use or otherwise than as might be acquired or conferred under the provisions of the Act or of some existing or future Act. By s. 2 "water" was declared to mean all rivers and water power not being waters under the exclusive jurisdiction of the Parliament of Canada, and "unrecorded water" was declared to mean all water not held under a record under the Act or under certain repealed Acts or under special grant by public or private Act and should include all water for the time being unappropriated or unoccupied or not used for a beneficial purpose.

On April 7, 1906, the Water Commissioners for the district of New Westminster, British Columbia, purporting to act under the provisions of this Act, granted to the appellants, the Burrard Power Company, Limited, at an annual rental of $566, a water record for 25,000 inches of waters out of the Lillooet Lakes and the Lillooet River to be used for generating electricity. These waters are within the Railway Belt.

[1911] A. C. p. 93.

On December 26, 1906, the Attorney-General for the Dominion of Canada filed an information in the Exchequer Court of Canada against the Power Company, claiming a declaration that the record was invalid and conveyed no interest to the defendant company, and asking that the same should be cancelled. The information alleged that the works of the Power Company if carried out would have the effect of diverting the water of the river, thereby interfering with its navigation, and would otherwise materially diminish the value of the lands of the Dominion Government in the Railway Belt. In support of the claim reliance was placed on the agreement contained in the Terms of Union, and on the provisions of the Acts of the provincial Legislature passed for the purpose of giving effect to that agreement. Reliance was also placed on the provisions of s. 91 of the British

North America Act, 1867, which declares that the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within certain classes of subjects, including the public debt and property and navigation. It was further submitted that, having regard to sub-s. 2 of s. 131 of the Water Clauses Consolidation Act, 1897, the grant of the record by the Commissioners was not authorized by the Water Clauses Act.

After the filing of the information the Attorney-General of British Columbia was added as a party to represent the interests of the Province.

On December 23, 1907, the determination of the issue of fact was referred for inquiry and report to Archer Martin J., who found the facts to be in accordance with the allegations of the Dominion Government, and reported accordingly. Thereupon the Attorney-General of Canada prayed judgment as asked by the information. On April 13, 1909, the case came on for argument before Cassels, J., and on May 10, 1909, that learned judge declared that the grant of the record of water in question was invalid and conveyed no interest to the defendant company. The judgment proceeded on three grounds: first, that the grant was an interference with property subject to the exclusive authority of the Dominion of Canada; secondly, that the diversion of water intended to be authorized thereunder would be a very serious interference with the navigability of the river; and thirdly, that the record was not authorized by the provisions of the Water Clauses Act under which it had been granted. From this judgment an appeal was brought to the Supreme Court of Canada. The appeal was dismissed on February 15, 1910.

[1911] *A. C.* *p.* 94.

Their Lordships are of opinion that the judgments of the Courts below are right. The grant by the Province of British Columbia of "public lands" to the Dominion Government undoubtedly passed the water rights incidental to those lands. In the argument addressed to their Lordships this was not really questioned. But it was said that though the proprietary rights of the Province in the land and in the waters belonging thereto were transferred to the Dominion Government, the legislative powers of the Province over the same neither were nor could be parted with, and that therefore it was competent for the provincial Legislature to enact the Water Clauses Act of 1897 under which the record was granted. In support of this contention a passage was cited from the judgment of Lord Watson in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1). Their Lordships are of opinion that the contention is wrong, and that the passage in Lord Watson's judgment affords no kind of

(1) 14 App. Cas. at p. 301, *ante*, p. 403.

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support for it. The object of article 11 of the Terms of Union was on the one hand to secure the construction of the railway for the benefit of the Province and on the other hand to afford the Dominion a means of recouping itself in respect of the liabilities which it might incur in connection with the construction by sales to settlers of the land transferred. To hold that the Province after the making of such an agreement remained at liberty to legislate in the sense contended for would be to defeat the whole object of the agreement, for if the Province could by legislation take away the water from the land it could also by legislation resume possession of the land itself, and thereby so derogate from its own grant as to utterly destroy it. Lord Watson's reference in the *Precious Metals Case* (1) to the 11th article, so far from supporting the appellants' contention, is against it. He says "the conveyance contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands and to appropriate their revenues." The grant of the water record in the case now under consideration is an attempt on the part of the Province to appropriate the revenues to itself, and would if carried into effect violate the terms of the contract as interpreted by Lord Watson. It is true that Lord Watson adds that the land is not by the transfer taken out of the Province, and that once it is "settled" by the Dominion it ceases to be public land, and "reverts to the same position as if it had been settled by the provincial Government in the ordinary course of its administration." But this also is against the appellants' contention, for it implies that until settled by the Dominion it remains public land under the Dominion's control.

[1911] *A. C.* *p.* 95.

Their Lordships are of opinion that the lands in question so long as they remain unsettled are "public property" within the meaning of s. 91 of the British North America Act, 1867, and as such are under the exclusive legislative authority of the Parliament of Canada by virtue of the Act of Parliament. Before the transfer they were public lands, the proprietary rights in which were held by the Crown in right of the Province. After the transfer they were still public lands, but the proprietary rights were held by the Crown in right of the Dominion, and for a public purpose, namely, the construction of the railway. This being so, no Act of the provincial Legislature could affect the waters upon the lands. Nor, in their Lordships' opinion, does the Water Clauses Act of 1897 purport or intend to affect them; for, by clause 2, the Act expressly excludes from its operation waters under the exclusive jurisdiction of the Dominion Parliament (2).

(1) 14 App. Cas. 295, *ante*, p. 111.

(2) Disc. *British Columbia* v. *Canada*, *post*, p. 789.

The Lordships will humbly advise His Majesty that the appeal should be dismissed with costs. J. C. 1910

Solicitors for appellants: *Gard, Rook & Co.*
Solicitors for respondent: *Charles Russell & Co.*

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WYATT *v.* QUEBEC (FISHING RIGHTS) [1911], A. C. 489. J. C.* 1911

WYATT AND OTHERS . . . . . APPELLANTS; *March* 1, 2, 6; *June* 13.

AND

ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Rights of Fishing—River navigable and floatable—Exclusive Right of the Crown to Fishing—Letters Patent in respect of Lands did not convey Fishing Rights—Construction.

The appellants were grantees of lands on both sides of a river which was shewn by the evidence to be navigable and floatable at such locality and from thence to its mouth:—

Held, that the right of fishing in the river vested exclusively in the Crown, and that, as the letters patent to the appellants in 1883 granting the said lands were plain and unambiguous in their terms and did not specifically grant rights of fishing in the river opposite thereto, the patentees could not claim such rights under previous or subsequent correspondence as enlarging the terms of the grants, or by reason of such rights having been exercised by them continuously from the date of the patents without hindrance or interference.

Appeal by special leave from a judgment of the Supreme Court (October 17, 1906) reversing a judgment of the Court of King's Bench, Appeal Side (January 12, 1906), and restoring a judgment of the trial judge, Larne, J. (February 16, 1904).

An information was filed on March 18, 1903, on behalf of the Crown by the Attorney-General of the Province of Quebec, for the purpose of obtaining a decision of the Court as to the right of fishing in the Moisie River in that Province.

The Crown claimed that the river between the lots granted to the defendant Fraser (the other defendant Adams being his lessee) was "public, navigable, and floatable" and as such a "dependency for the Crown domain"; "that the right of fishing therein is exclusively [1911] *A. C.* *p.* 490.

* *Present*:—LORD MACNAGHTEN, LORD MERSEY, LORD ROBSON, and SIR ARTHUR WILSON.

J. C. 1911

WYATT v. ATTORNEY-GENERAL OF QUEBEC.

vested in the King in his right of the Province of Quebec, and in such person or persons as the Crown may have leased or may in the future lease the same to"; and that Fraser and Adams and all persons claiming under them "be declared to have no right to fish in the said river Moisie or any part thereof," and to be perpetually enjoined from fishing therein.

The appellants are Fraser's legal representatives and contended that they were riparian proprietors of the lots of land in question by virtue of letters patent from the Province of Quebec and as such had the exclusive right of fishing in the river opposite to such lots; that for years before and after the grant, and at the time it was made, the Government of Quebec by the acts, letters, and writings of its ministers and officials always recognized such right; and also that the river was neither navigable nor floatable, and that in consequence they as riparian proprietors owned the stream and the fishing therein.

The letters patent dated June 21, 1883, conveyed the lots of land, which were five in number, on either side of the river and had a frontage thereon. No reference was made in any of those instruments to the right of fishing. They were all expressed in the same terms, the habendum being to the grantee, "his heirs and assigns for ever in free and common soccage, by fealty only, in like manner as lands are holden in free and common soccage in that part of Great Britain, called England. Provided always that this grant is subject to the provisions of the Act 43 and 44 Victoria chap. 12, entitled: 'The Quebec General Mining Act of 1880.'"

At the trial evidence was given as to the negotiations between Fraser and his associates and the Department of Crown Lands which led up to the grant of the letters patent; also as to the character of the river between the lots of land granted and as to its fitness for useful navigation.

[1911] *A. C.* p. 491.

The trial judge found (1.) that the negotiations did not contradict the clear language of the grants, and did not disclose an intention on the part of the Crown to convey anything more than the lands described in the grant; (2.) that the river Moisie from a point above the lands granted to its mouth is a public navigable and floatable river, forming part of the Crown domain.

The Court of Appeal reversed this judgment on the ground that prior to the issuing of the patents for the riparian lots in question there had been a concluded agreement between the applicants and the Crown to the effect that the applicants should have, in addition to the lots of land, the right of fishing in the river opposite to them.

The Supreme Court held that the patent in question was plain and unambiguous in its language; that the rights of the parties must be

determined by it, and cannot be added to, altered, or diminished by any previous negotiations written or oral leading up to its issue; that if evidence of correspondence were admissible it failed to establish any independent or collateral contract; that the legal effect of the patent in regard to the fishing rights in question depended upon the determination of the question whether the river in the course of the four or five of its miles covered by the patent is navigable or floatable within the meaning of the law of the Province of Quebec. Adopting the test of navigability laid down in *Bell* v. *Corporation of Quebec* (1), the Supreme Court concurred with the findings of the trial judge, which were not questioned by the judgment of the Court of Appeal, that the river in question in the locality of the lands granted and from thence to its mouth was navigable and floatable.

Macmaster, *K.C.*, *Duke*, *K.C.*, *Belleau*, *K.C.*, and *Halsey*, for the appellants, contended that this judgment should be reversed and that of the Court of King's Bench restored. It was clear from the correspondence and course of dealing between the parties that the Government intended to sell and Fraser and his associates intended to acquire not merely the lots of land on either side of the river, but the fishing rights in the river between them. The letters patent on their true construction gave effect to this contention and did not derogate from the clear purpose disclosed by the correspondence. The Court of King's Bench was right in holding that the transaction was based on a written application by the appellants' predecessors for the purchase of the lots, and the right of fishing, that the Crown had assented thereto, and that the grantees had publicly and peaceably possessed and enjoyed the fishing rights for twenty years. The only point left open by the concluded contract was to fix by mutual consent the extent of the grant alongside the river and the price. The mere silence of the subsequent patents as to fishing rights was insufficient to detract from the legal effect of the agreement duly made and acted upon for so long a period. Moreover the evidence shewed that the river was in fact non-navigable and non-floatable and that the application for the lots and its acceptance proceeded upon that footing to the knowledge of both parties. Consequently the intention and effect of the transaction were to convey the property in the river which carried with it the right of fishing as incident thereto, unless there was an express reservation to the contrary. This river was not navigable for the purposes of ordinary commerce. Logs and timber might be floated, but such navigation as was shewn to exist did not satisfy the test laid down in *Bell* v.

[1911] *A. C.* p. 492.

(1) (1879) 5 App. Cas. 84, 92, *ante*, p. 232.

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Corporation of Quebec (1). It must be shewn that the river can be employed for the purposes of traffic. This river is 400 miles long, and it is not suggested that it is navigable except for the lower seventeen or eighteen miles of its course; and as regards that portion, there was only an intermittent and non-continuous carriage of fish in small river craft. There was no general traffic, the soil was too poor for cultivation, and the population too slight to produce commercial products. Reference was made to the Quebec Civil Code, art. 400; Quebec Act, 62 Vict. c. 23, s. 1374 (*c*) sub-s. 4; *Reg.* v. *Robertson* (2); *Attorney-General for Trinidad* v. *Bourne* (3).

Sir R. Finlay, K.C., *Lafleur*, K.C., and *Hamar Greenwood*, for the respondent, contended that there were concurrent findings of fact by the trial judge and the Supreme Court that the river opposite the lots granted to the appellants' predecessors and thence to its mouth was navigable and floatable. The Court of King's Bench did not disturb this finding and pronounced no opinion to the contrary. The result was that by the law of the Province of Quebec the right of fishing therein was exclusively vested in the Crown unless specially granted. Reference was made to the *Fisheries Case, Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia* (4); *Reg.* v. *Robertson* (2); *Hurdman* v. *Thompson* (5). Accordingly the letters patent were grants of land only, bounded by a navigable and floatable river, and did not and were not intended to grant any rights of fishing. The silence of the grants as to fishing is readily explained by the fact that up to 1898, when the *Fisheries Case* (4) was decided, it was generally supposed that the fishing in navigable rivers was controlled by the Dominion Government and not by the Province. It was contended that there was no special grant of fishing in the letters patent, and no evidence of any completed contract between the parties prior thereto. The negotiations leading up to the grants could not be received in evidence for the purpose of enlarging or modifying the clear and unambiguous terms of those grants; and it was contended that if received they failed to establish any independent or collateral contract. There was no evidence of any misleading statements or of any negligence in disclosing material facts which would create an estoppel. Moreover no estoppel can be created against the Crown by misleading statements or suppressions of fact by its servants; otherwise the effect might be that the Crown would be compelled to grant rights which it might be inexpedient on grounds of public policy to part with.

[1911] *A. C.* p. 493.

(1) 5 App. Cas. 84, 92, *ante*, p. 232.
(2) (1882) 6 Can. S. C. R. 52.
(3) [1895] A. C. 83.
(4) [1898] A. C. 701, 709, *ante*, p. 542.
(5) (1895) Quebec L. R. 4 Q. B. 409, 445.

Macmaster, K.C., in reply, cited *Attorney-General and City of Hull* v. *Scott* (1); *Ramsden* v. *Dyson* (2); *Plimmer* v. *Mayor, &c., of Wellington* (3); *Rees* v. *Miller* (4).

The judgment of their Lordships was delivered by

1911
June 13.

LORD MACNAGHTEN. This is an appeal from the unanimous judgment of the Supreme Court of Canada reversing a judgment of the Court of King's Bench in Quebec and restoring that of the Superior Court. [1911] A. C. p. 494.

The question relates to the right of fishing in a stretch of the river Moisie, some six miles long, lying below the first rapids met with in going up the river. The Moisie is a large river about 200 miles in length. The first rapids are about seventeen miles from its mouth. They are known as the Grand Portage.

The proceedings in this action were commenced by an information filed on behalf of the Crown by an Attorney-General of the Province of Quebec complaining of the late defendant Fraser and his co-defendant Adams. Under letters patent granted in 1883 Fraser became the proprietor of narrow belts of land on both sides of the river. The respondent Adams was his lessee. Fraser and Adams claimed to be entitled to the exclusive right of fishing in the river opposite Fraser's lands. The information prayed for a declaration that the river opposite those lands was a public, navigable, and floatable river, forming part of the dependency of the Crown domain in the Province of Quebec, and that the right of fishing was exclusively vested in the Crown in right of the Province of Quebec and in the Crown's lessees. The information concluded by asking for an injunction in accordance with that declaration.

The defendant Fraser, on the other hand, by his plea claimed to have the exclusive right of fishing opposite to his lands. He alleged that for years before and after the date of the letters patent the Government of Quebec, by the acts and letters of its ministers and officials, recognized such rights. He asserted, moreover, that the river was neither navigable nor floatable, and that consequently the riparian proprietors were owners of the stream and the right of fishing in it.

The Attorney-General demurred to so much of the defendant's plea as alleged facts tending to vary or supplement the letters patent under which Fraser claimed. The demurrer was sustained in the Superior Court, but it was overruled on appeal by an order of the

(1) (1904) 34 Can. S. C. R. 603.
(2) (1866) L. R. 1 H. L. 129, 170.
(3) (1884) 9 App. Cas. 699, 710.
(4) (1882) 8 Q. B. D. 626, 629.

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[1911] *A. C.* p. 495.

Court of King's Bench on the ground that the allegations in question were relevant and contained facts tending to support the pretensions of the defendants that the grant from the Crown included the right of fishing in the river opposite the lands granted. From that order there was no appeal. Evidence was then gone into at great length. The trial judge held (1.) that the negotiations between Fraser and his associates on the one hand and the Department of Crown Lands on the other did not disclose an intention on the part of the Crown to convey to the applicants anything more than the lands described in the letters patent, and (2.) that the river Moisie from the Grand Portage to its mouth was a public, navigable, and floatable river.

In the Court of King's Bench this judgment was reversed on the ground that, prior to the issue of the letters patent in 1883, there was a concluded agreement between the applicants and the Crown to the effect that, in addition to the land which was the subject of the grant, the grantees should have the right of fishing in the river opposite.

The Court of King's Bench did not pronounce any decision as to the navigability of the river Moisie at the place in question.

The avowed object of Fraser and his associates in applying for grants of land along the banks of the Moisie was to secure the right of fishing in the river. The Government of Quebec, however, was not asked to grant any rights of fishing with the lands which were the subject of the application. At the same time it cannot be disputed that, from the date of the letters patent until recent times, it was considered, even by officials of the Quebec Government, that the right of fishing in the river opposite to the lands granted to Fraser and his associates did belong to the applicants and to Fraser as their representative and successor in title; and undoubtedly such right was exercised by them and by him continuously without hindrance or interference. Beyond this the evidence does not go. There is no suggestion of encouragement on the one hand, or of expenditure of money on the other, such as might possibly raise an equity against the real owner if the controversy were between private persons. On the contrary, it appears that for many years Fraser and his predecessors in title derived a large revenue from the fishing without any expenditure of money beyond the comparatively trifling sum paid as the consideration for the land grants.

[1911] *A. C.* p. 496.

The attitude of the parties is probably explained by the fact that at the time when the applicants were in negotiation with the Quebec Government it was a moot point whether rivers which were Crown property belonged to the Crown in right of the Dominion or in right of the Province. That question, which was one of considerable difficulty under the peculiar wording of Sched. III. of the British

North America Act of 1867, was not finally settled until the year 1898, when it was held by this Board, affirming the Supreme Court, that under the words "rivers and lake improvements," in Sched. III., rivers, apart from improvements, were not vested in the Crown in right of the Dominion, but remained vested in the Crown in right of the Province (1).

It was, moreover, supposed or taken for granted that the river Moisie was not a navigable or floatable river.

The matter has been dealt with so fully and so satisfactorily in the judgment of the Supreme Court, delivered by Girouard, J., that it is unnecessary for their Lordships to go through the facts of the case. They cannot do better than repeat the concluding words of the judgment.

"Summarized," says the learned judge, "our holdings are:—That the patent issued by the Crown is plain and unambiguous in its language; that the rights of the parties must be determined by it, and cannot be added to, altered, or diminished by any previous negotiations written or oral leading up to its issue; that therefore the application of the patentee and subsequent correspondence between him and the Crown officials should not have been received in evidence for the purpose of explaining the patent, and, if looked at for the purpose of establishing an independent or collateral contract conferring additional rights upon the patentee, entirely failed to do so; that the legal effect of the language of the patent with respect to the bed of the river and the fishing rights therein depends upon the determination of the question whether the Moisie at and in the four or five of its miles covered by the patent is navigable or floatable within the meaning of the law of Quebec, and that, adopting the test of navigability laid down by the Privy Council . . . . we concur with the findings of the trial judge, and which findings are not questioned in the judgment of the Court of Appeal that such river at such locality and from thence to its mouth is so navigable and floatable." [1911] *A. C.* *p.* 497.

The matter, as the learned judge points out, must depend ultimately upon the question of the navigability of the river Moisie. It may be, as contended by the learned counsel for the appellants, that the evidence in favour of navigability is not so clear or so strong as the learned trial judge considered it to be. But still in the opinion of their Lordships there is sufficient evidence to support his finding; and this is not a case in which their Lordships would lightly dissent from the concurrent findings of the trial judge and the Supreme Court of Canada.

(1) *Canada* v. *Ontario*, *ante*, p. 551.

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WYATT v. ATTORNEY-GENERAL OF QUEBEC.

It may perhaps seem hard, as urged by the learned counsel for the appellants, that persons should be deprived of so valuable a property after enjoyment so long continued. But it must be borne in mind that when the advisers of the Crown sought to establish the right of the Government of Quebec they were met, not by an appeal for favourable consideration, but by a claim of adverse right which left them no alternative but to institute hostile proceedings by way of ejectment.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Hills, Godfrey & Halsey.*
Solicitors for respondents: *Charles Russell & Co.*

J. C.* 1911
July 21, 27; *Nov.* 2.

THE KING *v.* LOVITT, [1912] A. C. 212.

THE KING . . . . . PLAINTIFF;

AND

IRVINE A. LOVITT AND OTHERS . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

New Brunswick Succession Duty Act, 1896, *s.* 1 (5.)—*Construction—Locality of Simple Contract Debts—Lex loci and Administration—Lex domicilii and Distribution.*

By New Brunswick Succession Duty Act, 1896, s. 1 (5.), all property situate within the province is liable to succession duty whether the deceased was domiciled there or not; such duty being assimilated by other provisions of the same Act to a probate duty payable for local administration.

The testator, resident and domiciled in the Province of Nova Scotia, at the date of his death was possessed of $90,351 deposited in the New Brunswick branch of the Bank of British North America, the head office of which is in London; and the amount was paid to his executors after they had obtained ancillary probate in New Brunswick:—

Held, reversing the judgment of the Supreme Court, that the executors were liable to pay succession duty.

The property consisted of simple contract debts, the obligation to pay being primarily confined to the New Brunswick branch of the bank, and these debts for the purpose of legal representation, of collection, and of administration as distinguished from distribution are governed by the law of New Brunswick, where they were locally situated.

Blackwood v. *Reg.* (1882) 8 App. Cas. 82, followed.

* *Present*:—VISCOUNT HALDANE, LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

Appeal by special leave from a judgment of the Supreme Court (March 11, 1910) reversing a judgment of the Supreme Court of the Province of New Brunswick (April 21, 1906) on a special case submitted to that Court.

The question submitted to that Court was whether under the circumstances stated in their Lordships' judgment the respondents as executors of the estate of G. H. Lovitt, who died at Yarmouth on November 14, 1900, domiciled in Nova Scotia, were liable to pay succession duty to the Province of New Brunswick in respect of $90,351 which had been deposited by the testator in December, 1898, in the Bank of British North America at St. John, New Brunswick. The material sections of the Succession Duty Act are set out in their Lordships' judgment. [1912] A. C. p. 215.

Ancillary probate of the will was granted by the Probate Court of St. John, New Brunswick, to the respondents, who thereupon obtained payment of the money deposited.

The Provincial Supreme Court decided in favour of the appellant, and thereupon $3521 were awarded as the agreed amount of duty.

The Supreme Court of Canada by a majority of four to two reversed this judgment and decided that the appellant was not entitled.

Fitzpatrick, C.J., was of opinion that the amount of the bank's indebtedness to the deceased was, in the terms of the proviso to s. 5 of the Succession Duty Act, property outside of the Province of New Brunswick owned at the time of his death by a person not then domiciled within that province, and that the New Brunswick Act cannot constitutionally have effect to impose a tax upon persons domiciled and resident in Nova Scotia in respect of a succession coming to them under the laws of Nova Scotia.

Girouard, J., held that the laws of New Brunswick had not imposed a succession duty upon the specific property claimed by the estate of the deceased, and that the property, being personal, was governed by the law of the domicil of the testator.

Davies and Anglin, JJ., considered that the debt was that of the bank, a British corporation with its head office in London, not that of its agency in St. John, and that consequently the debt was "outside of the province" and not within it at the time of the testator's death.

Idington, J., on the other hand, considered that a contract had been made within the province and had become taxable, and further that the executors having taken out ancillary probate in

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New Brunswick had admitted that the property was in New Brunswick.

Duff, J., came "to the conclusion that the moneys in question were properly demandable only at the branch at St. John, that the Province of New Brunswick was the proper forum for the recovery and consequently the situs of the moneys deposited within the meaning of the Succession Duty Act"; and he held further that the executors by obtaining a grant of ancillary probate had elected to treat the moneys as assets within New Brunswick.

[1912] A. C. p. 214.

Sir R. Finlay, K.C., *Hazell, K.C.*, and *Rowlatt*, for the appellant, contended that he was entitled to the succession duty as claimed. The amount deposited with the provincial bank was a debt payable at St. John and actually collected there by the respondents. It was therefore property within the meaning of the provincial Succession Duty Act, and its actual situs, consisting as it did of simple contract debts, was within the province. It was therefore liable to the duty claimed. These simple contract debts were primarily recoverable at St. John. Even if the respondents might have obtained ancillary probate and collected the amount elsewhere, they elected to obtain probate and recover the amount at St. John, and are precluded thereby from disputing their liability to pay duty, especially as the liability thereto is based upon administration. Reference was made to *Blackwood* v. *Reg.* (1); *Commissioner of Stamps* v. *Hope* (2); *Harding* v. *Commissioners of Stamps for Queensland* (3); *Attorney-General* v. *Newman* (4). With regard to the relations subsisting between branch banks and the principal firm, see *Prince* v. *Oriental Bank Corporation* (5) and the cases there cited.

Newcombe, K.C., and *Austen-Cartmell*, for the respondents, contended that the judgment of the Supreme Court should be affirmed. The Succession Duty Act of New Brunswick, 1896, as amended by the Act c. 36 of 1897 governs the case. The statute is reproduced in New B. Consol. Stat. 1903, c. 17, but with certain variations which do not apply. It was contended that the Act of 1896 on its true construction applied to succession and not to administration. It did not impose any tax on the property in question of the testator, who died domiciled in Nova Scotia, but taxed the title of the successor. Under s. 5 it is the

(1) 8 App. Cas. 82, 92.
(2) [1891] A. C. 476.
(3) [1898] A. C. 769.
(4) (1901) 1 Ont. L. R. 511, in appeal from (1900) 31 Ont. R. 340.
(5) (1878) 3 App. Cas. 325.

beneficiary who is made liable for the duty. Accordingly, if the situs of the property is assumed to be in New Brunswick, the actual subject of taxation was not that property, but the title of the beneficiary under the will. That title was not within the province nor did it devolve under the law of the province, and therefore could not be taxed by the provincial Legislature. They referred to *Lambe* v. *Manuel* (1). As the succession duty claimed in this case attached only on the devolution of property, which devolution was regulated by the laws of another province, the situs of the property wherever actually situated must be deemed to be within the province by whose laws its devolution was governed and its successor claimed title. Taxation imposed on such succession, that is on the title which passed at the testator's death in respect of these deposits, was not within the province and was not direct taxation within the meaning of British North America Act, 1867, s. 92, art. 2. See also *Winans* v. *Attorney-General* (2); *Railroad Co., Cleveland, &c.* v. *Pennsylvania* (3). Apart from the question of the succession being taxable, it was contended that the situs of these simple contract debts was not in St. John, where the bank happened to have a branch office. The debts were payable by the Bank of British North America, a corporation which had its head office in England, and for the purpose of the Bank Act (see R. S. C., 1906, c. 29, s. 7) in the city of Montreal in the Province of Quebec. The testator, moreover, was domiciled in Nova Scotia. On that account also the debts were property in Nova Scotia. They might be discharged in New Brunswick, but the bank might also discharge them at any of its branches upon surrender of the deposit receipts. So far as the locality of these debts depended on his domicil they were not subject to duties imposed by the New Brunswick Legislature. Under these circumstances it was contended that the Succession Duty Act of 1896 so far as it imposed duties as claimed was ultra vires of the Legislature as defined by s. 92 of the Act of 1867. They were not payable upon probate, and the deposits could have been collected without ancillary probate from the local Court, which was unnecessary for the purpose of recovering the debts evidenced by the said receipts.

[1912] A. C. p. 215.

[1912] A. C. p. 216.

Sir R. Finlay, K.C., replied.

The judgment of their Lordships was delivered by

1911 *Nov.* 2.

LORD ROBSON. This is an appeal from a judgment of the

(1) [1903] A. C. 68.
(2) [1910] A. C. 27, 30, 33.
(3) (1872) 82 U. S. (15 Wallace) 300.

J. C. 1911

REX v. LOVITT.

Supreme Court of Canada reversing a judgment of the Supreme Court of New Brunswick. The question at issue is whether the defendants, who are the executors of the will of George H. Lovitt, deceased, are liable to pay succession duty in respect of money which the testator had placed on special deposit in the St. John (New Brunswick) branch of the Bank of British North America.

The testator in his lifetime resided at Yarmouth in the Province of Nova Scotia and was domiciled in that province. He died on November 14, 1900, being possessed of receipts for two sums, making together the sum of $90,351, deposited by him with the said branch bank. It is sufficient to set forth one of the receipts, which are identical in terms except as to amount.

"No. 2112.

"Deposit receipt.

"Incorporated. Bank of British North America. Royal Charter.

"St. John, N. B.,

"30th December, 1898.

"Received from George H. Lovitt the sum of three thousand five hundred and seventy-five dollars, and 83·100 dollars, which amount will be accounted for by the Bank of British North America on the surrender of this receipt, and will bear interest until further notice at the rate of three per cent. per annum. Fifteen days' notice to be given of its withdrawal, and no interest to be paid unless the money remains in the bank three months.

"For the Bank of British North America,

"H. A. Harvey.

"Manager.

"$3575. 83, Entd. O. H. Sharp,

"Accountant.

"Not transferable."

The head office of the Bank of British North America is in London, and Mr. Harvey, who signed the receipts on behalf of the bank, was manager of the St. John's branch wherein the money was in fact deposited. On the testator's death the defendants gave the stipulated notice of withdrawal to the St. John's branch, but the manager refused to pay the money unless and until they took out ancillary probate in New Brunswick. This they did, and thereupon the manager of the St. John's branch paid the sums claimed.

[1912] *A. C.* *p.* 217.

By s. 92 of the British North America Act, 1867, exclusive power is given to the Legislature of each province to make laws in relation to direct taxation within the province in order to raise revenue for provincial purposes.

The plaintiff's claim for succession duty is founded mainly on s. 5, sub-s. 1, of the Succession Duty Act of New Brunswick, 1896, which enacts that "all property, whether situate in this province or elsewhere, other than property being in the United Kingdom of Great Britain and Ireland, and subject to duty, whether the deceased person owning or entitled thereto had a fixed place of abode in or without this province at the time of his death, passing either by will or intestacy"—here follow words dealing with property voluntarily transferred for the purpose of evading succession duty—"shall be subject to a succession duty to be paid for the use of the province over and above the fees provided by the chapter of these consolidated statutes relating to probate courts," and then follow provisions fixing the amount of the duty according to the aggregate value of the property and the relationship of the successors to the deceased.

On this statute being passed a question arose as to whether a provision in such wide terms as those set forth in s. 5, sub-s. 1, was within the constitutional powers of the province, and so in 1897 the Legislature of New Brunswick added sub-s. 2 to s. 5, which at the time of the testator's death stood as follows:

"The provisions of this section are not intended to apply and shall not apply to property outside this province owned at the time of his death by a person not then having a place of residence within the province, except so much thereof as may be devised or transferred to a person or persons residing within the province."

In the Consolidated Statutes for 1908 this sub-section appears as amended by the word "domiciled" being substituted for the words "having a place of residence." [1912] *A. C.* *p.* 218.

By s. 2, sub-s. 1, of the Act the word "property" is declared to include "real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives."

Broadly stated s. 5 (sub-ss. 1 and 2) seeks to bring within the scope of succession duty—

(*a*) All property situate within the province whether the deceased was domiciled there or not;

(*b*) All property outside the province belonging to persons domiciled therein; and

(*c*) Even all property outside the province belonging to persons not domiciled therein, if such property be devised to a person resident therein.

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We are here concerned only with (*a*), that is to say, the case of property said to be within the province, belonging to a person domiciled outside.

The actual situs of the property is therefore the first question to be determined.

The property consisted of simple contract debts, and as such could have no local situation other than the residence of the debtor where the assets to satisfy them would presumably be: per Lord Field in *Commissioner of Stamps* v. *Hope* (1). The plaintiff's contention was that, on the facts of this case, the proper place for the recovery and enforcement of the debts in question was St. John, New Brunswick. The defendants, on the other hand, contend that the testator deposited his money generally in the Bank of British North America, wherever situate, and that it was repayable, certainly in London, where the bank had its headquarters, and probably even at any of its branches.

According to the defendants' contention the bank in London might be called on at any time by a person of whom it would probably know nothing, and with only a very limited time in which to obtain the detailed information that would be necessary from the St. John's branch, to pay $90,351 in London without any deduction for cost of transmission or any agreement as to the rate of exchange. No such obligation appears by express words or necessary implication in the contract of the parties, and it is very improbable that it was ever contemplated or intended by them. It is true that the money was to be "accounted for by the Bank of British North America," but when the circumstances are considered it is seen that those words mean only that the bank is to account for the money as being money payable by them or their agents at St. John. Thus, if the manager of the St. John's branch refused payment, or if the branch itself were closed, the bank in London would, of course, be liable as a principal, but that fact does not affect the locality of the debt as originally fixed by the parties.

[1912] *A. C.* *p.* 219.

Although branch banks are agencies of one principal firm, it is well settled that for certain special purposes of banking business they may be regarded as distinct trading bodies. Thus, it was held in *Woodland* v. *Fear* (2) that the obligation of a bank to pay the cheques of a customer rested primarily on the branch at which he kept his account, and that the bank in that case had rightfully refused to cash the cheque at another branch. Commenting on that decision, Sir Montague Smith, in delivering the

(1) [1891] A. C. 476. (2) (1857) 7 E. & B. 519.

judgment of their Lordships' Board in *Prince* v. *Oriental Bank Corporation* (1), points out that it would be difficult for a bank to carry on its business by means of branches on any other footing, because the officials at one branch do not know the state of a man's account at another branch.

Similarly (as Lord Campbell points out in *Woodland* v. *Fear* (2)) the case of *Clode* v. *Bayley* (3) shews that different branches of the same establishment may be indorsers from one to the other, and that, in case of dishonour, notice need not be given direct to the principal establishment, but that each branch in succession is entitled to notice.

In each of these cases the Courts, having regard to the necessary course of business between the parties, held that the bank had in some measure localized its obligation to its customer or creditor, so as to confine it, primarily at all events, to a particular branch. The present case comes well within the principles thus laid down, and their Lordships are of opinion that these debts were "property situate within the province" of New Brunswick. [1912] *A. C.* p. 220.

The defendants, however, contended that the situation of the property is to be determined, not by its actual locality, but according to the principle expressed in the maxim "Mobilia sequuntur personam." Personal property of a movable nature is considered, they say, to follow the person of the owner and is, in contemplation of law, situate wherever he is domiciled. In this view the property was neither in London nor New Brunswick, but in Nova Scotia.

It is necessary, therefore, to examine somewhat closely the sense in which movables are said to "follow the owner." It cannot mean that for all purposes the actual situation of the property of a deceased owner is to be ignored and regard had only to the testator's domicil, for executors find themselves obliged in order to get the property at all to take out ancillary probate according to the locality where such property is properly recoverable, and no legal fiction as to its "following the owner" so as to be theoretically situate elsewhere will avail them. The case of legacy and succession duties, however, has been placed by our law on a different footing.

In construing the statutes relating to those duties, our Courts have laid it down that the very general terms in which they are expressed must receive some limitation. Their language is wide enough to include all property and every person everywhere,

(1) 3 App. Cas. 325. (2) (1857) 7 E. & B. 519.
(3) (1843) 12 M. & W. 51.

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whether subjects of this kingdom or not, and no matter where they are domiciled. It has accordingly been held, through a long series of cases, that the duties are intended to be imposed only on those who become entitled by virtue of our law. The effect of this principle is to exempt from the payment of legacy or succession duties movable property situate here which belonged to a testator domiciled abroad, for in dealing with the distribution of such property our Courts act not on our own law, but on the law of the domicil of the testator or intestate on which the legatee or successor founds his title. Similarly in the case of movables situate abroad which belonged to a person domiciled here our Courts will direct their distribution according to our law and not that of the locality where they are found. In *Blackwood* v. *Reg.* (1) Sir Arthur Hobhouse, in delivering the judgment of their Lordships' Board, says: "For the purpose of succession and enjoyment, the law of the domicile governs the foreign personal assets. For the purpose of legal representation of collection and of administration as distinguished from distribution among the successors they are governed not by the law of the owner's domicile but by the law of their own locality."

[1912] *A. C.* *p.* 221.

When, therefore, it is said that "Mobilia sequuntur personam" all that is meant is that for certain limited purposes we deal with "mobilia" (or leave them to be dealt with) under the law governing their owner as though they were situate in his country instead of ours, and, in return, foreign countries generally do the like with regard to English movables situate abroad.

The principle or practice thus defined is considered just and expedient as between nations, and our Courts give it full effect in the construction of taxing statutes both English and Colonial, but its application may be excluded by the use of apt and clear words in a statute for the purpose. The question now to be determined is whether that has been done in the present case by a Legislature having full authority in that behalf.

The same point, on substantially the same provision, came up for consideration by their Lordships' Board in the case of *Harding* v. *Commissioners of Stamps for Queensland* (2). In that case it was held that s. 4 of the Queensland Succession Duty Act, 1892 (which was identical with s. 2 of the English Succession Duty Act, 1853), must be read in the sense affixed to the English Act by the English tribunals, and that it did not include movables locally situate in Queensland which belonged to a testator whose domicil was in Victoria. The testator had died in 1894, when

(1) 8 App. Cas. 93. (2) [1898] A. C. 769.

the Queensland Act of 1892 was still operative, but in 1895 that Legislature amended the Act of 1892 by declaring that upon the issue of any grant of probate succession duty was chargeable in respect of all property within Queensland though the testator might not have had his domicil there. Lord Hobhouse, in delivering the judgment of the Board, said that if this amendment were retrospective it would be conclusive in favour of the Commissioners who were claiming the duty. This weighty opinion is precisely in point as regards the present case. Here the Legislature of New Brunswick has expressly enacted that all property situate in the province shall be subject to a succession duty though the testator may have had his fixed place of abode or domicil outside the province. The Act purports to exclude the application of the maxim "Mobilia sequuntur personam" as regards personal estate within the province belonging to persons domiciled elsewhere, but to retain it as regards the property of New Brunswick citizens situate outside the province.

[1912] *A. C.* p. 222.

The defendants next say that even assuming the physical property, out of which the tax was to be paid, be taken as situate in New Brunswick, and not at the place of the owner's domicil, yet the true subject-matter of the tax was not that property, but the succession or title which accrued to the successor under the testator's will by virtue of the law of the testator's domicil. In that view the tax was laid on something not "within the province" and so was beyond the competence of the local Legislature. On the basis of this contention the local Legislature might tax the actual property, namely, the money comprised in the receipts, to any extent it pleased, but must not call the tax a succession duty nor regulate its amount by reference to the relationship between the testator and the successor, or it would become a tax, not on the physical property but on a succession taking place outside the province. The defendants, in this connection, cited the case of *Lambe* v. *Manuel* (1), where it was held that the taxes imposed on movable property by the Quebec Succession Duty Act, 1892, applied only to property claimed by virtue of Quebec law, and had no application to property forming part of a succession devolving under the law of Ontario. That case, however, turned expressly on the construction of the particular statute, which was not phrased so as to qualify the application of the principle "Mobilia sequuntur personam." It was drawn in the general and unrestricted terms which the Courts have said must be read as subject to the limita-

(1) [1903] A C. 68, *ante*, p. 583.

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tion expressed by that principle. The case of *Harding* v. *Commissioners of Stamps for Queensland* (1) was before their Lordships in that case, and was cited in their judgment without any disapproval of the opinion there expressed that a Colonial Legislature may, if so minded, impose a succession duty on property within their province though such property devolved under the law of another domicil.

[1912] *A. C.* *p.* 223.

Although called a succession duty, the tax here in question was laid on the corpus of the property, and the statute made its payment a term of the grant of ancillary probate. By s. 6 the executor is required to give a bond for its due payment, and if he fails to do so the probate granted to him is cancelled. He is directed to deduct the duty before handing over the property (s. 15); to pay it forthwith to the Receiver-General of the province (s. 17); and if a foreign executor transfers the stock of any company in the province liable to duty, on which the duty has not been paid, he is to pay it, and the company permitting such transfer shall also become liable.

These provisions shew that the Act under consideration assimilates the tax to the probate duty. It is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province, and, in the view of their Lordships, it is intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator (2).

It is obvious that such an enactment may work with unexpected effect upon creditors and others who in the ordinary course of business have allowed their money or personal property to remain in a New Brunswick bank, or in the hands of a New Brunswick trader, without reflecting that, on their death, it would become subject to taxation of an amount so entirely disproportionate to the protection it may have received, perhaps only for a few days, from the New Brunswick law. Instead of the exemption from succession duty which the foreign recipient of personal estate ordinarily enjoys, by the comity of nations, in such cases, the duty in this case is even doubled against him. By s. 5, sub-s. 6, the duty is doubled where the money or personal property in New Brunswick belonging, say, to a Nova Scotian "goes to any person residing out of the province," as, for instance, to its owner's relatives in Nova Scotia. And the tax is on the gross sum, though it may be money used in trade, and, as such, be subject to many deductions before it can fairly be

[1912] *A. C.* *p.* 224.

(1) [1898] A. C. 769. (2) Dist. *Royal Bank* v. *The King*, *post*, p. 768.

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treated as net property. So far as it is net property it would be again subject to succession duty in Nova Scotia on its transfer to that province. But these are considerations rather for the New Brunswick Legislature than for the Law Courts, and though the Courts will not easily adopt a construction leading to such results, yet, if the language of the statute is explicit, effect must be given to it.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, the order of the Supreme Court of Canada set aside with costs, and the order of the Supreme Court of New Brunswick restored.

The respondents will pay the costs of the appeal.

Solicitors for appellant: *Field, Emery, Roscoe & Medley.*
Solicitors for respondents: *Charles Russell & Co.*

MONTREAL *v.* MONTREAL STREET RLY. [1912], A. C. 333.

J. C.* 1911 *Dec.* 7, 8. 1912 *Jan.* 16.

CITY OF MONTREAL . . . . . APPELLANTS;

AND

MONTREAL STREET RAILWAY . . . RESPONDENTS;

ATTORNEYS-GENERAL FOR CANADA AND QUEBEC . . . . . INTERVENANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Railway Act of Canada (1906, *R. S. C.*, *c.* 37), *s.* 8, *sub-s.* (*b*), *ultra vires—Provincial Railways—Jurisdiction of Board of Railway Commissioners.*

Held, that s. 8, sub-s. (*b*), of the Railway Act of Canada (1906, R. S. C., c. 37), which subjects any provincial railway (although not declared by Parliament to be a work for the general advantage of Canada) to those of its provisions which relate to through traffic, is ultra vires of the Dominion Parliament.

An Order dated May 4, 1909, of the Board of Railway Commissioners for Canada (created by Dominion Railway Act 3 Edw. 7, c. 58, and beyond the jurisdiction and control of any province) directed with regard to through traffic over the Federal Park Railway and the provincial street railway, both within and near the city of Montreal, that the latter should "enter into any agreement or agreements that may be necessary to enable" the former company to carry out its provisions with respect to the rates charged so as to prevent any unjust discrimination between any classes of the customers of the Federal line:— [1915] *A. C. p.* 334.

Held, that the said Order so far as it related to the provincial street railway was made without jurisdiction.

* *Present*:—EARL LOREBURN, L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

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Appeal by special leave from a judgment of the Supreme Court (March 11, 1910) reversing a judgment of the Board of Railway Commissioners for Canada (May 4, 1909).

The respondents' railway was constructed and is operated under special Acts of the Province of Quebec.

The Montreal Park and Island Railway was originally constructed and operated under provincial legislation, but was declared by the Parliament of Canada (57 & 58 Vict. c. 84, amended by 59 Vict. c. 28 and 6 Edw. 7, c. 129) to be a work for the general advantage of Canada, and is accordingly now subject only to the Parliament of Canada.

The lines of the two railways are physically connected at different points, both within and near the limits of the city of Montreal, and arrangements exist between them for the traffic of passengers and their continuous passage from points on the line of each to points on the line of the other. The cars of each railway also run over the tracks of the other.

Upon a complaint made to them by the city of Montreal, the Board of Railway Commissioners for Canada found (and under the Railway Act, s. 54, sub-s. 3, their finding was binding and conclusive) that the Federal railway above mentioned unjustly discriminated against the residents of Mount Royal Ward in the city of Montreal and in favour of the residents of the town of Notre Dame de Grace in respect of rates charged, and ordered it to grant the same facilities at the same rates to both classes of residents. It further ordered that with respect to through traffic over the respondents' railway the latter "be, and it is hereby required to enter into any agreement or agreements that may be necessary to enable the Montreal Park and Island Railway Company to carry out the provisions of this Order."

Under the said s. 54, sub-s. 3, the respondents obtained leave to appeal to the Supreme Court on a question (set out in their Lordships' judgment) as to the jurisdiction of the Board to make the Order as against them.

[1912] A. C. p. 335.

The Supreme Court by a majority held that the said s. 8 is ultra vires of the Parliament of Canada in so far as sub-s. (*b*) is concerned. Duff, J., who delivered its judgment, agreed with the minority that a provincial railway may be affected by Dominion legislation necessarily incidental to legislation affecting Dominion railways; and he instanced the passing of regulations touching traffic through the point of intersection of a Dominion and a provincial railway and the surrounding area. He said: "To the extent of that necessity we are justified in

implying a power to the Dominion to legislate for the provincial railways notwithstanding the circumstances that, broadly speaking, the exclusive legislative jurisdiction in respect of the provincial railways has been committed to the province; but the implication must, I think, be limited by this necessity." He considered that legislation respecting through traffic—involving the subjection of a provincial railway to the Railway Board—is not necessarily incidental to the exercise of the legislative powers of Parliament respecting a connecting Dominion railway. The power to legislate wholly with regard to through traffic need not be vested in a single authority; for "divided legislative authority is the principle of the British North America Act, and if the doctrine of necessarily incidental powers is to be extended to all cases in which inconvenience arises from such a division, that is the end of the federal character of the Union."

Davies and Anglin, JJ., dissented, being of opinion that legislation regarding through traffic was necessarily incidental to Dominion railway legislation.

Atwater, K.C., for the appellants, contended that s. 8, sub-s. (*b*), of the Railway Act (R. S. C., 1906, c. 37) is intra vires of the Parliament of Canada. Its provisions are necessarily incidental or ancillary to subjects of legislation assigned exclusively to that Parliament by the British North America Act, 1867, that is to federal railways and the regulation of trade and commerce. Through traffic from a federal to a provincial railway is not a local work or undertaking within the meaning of s. 92, sub-s. 10. If a provincial railway deals in through traffic in agreement with a federal railway the jurisdiction over it must necessarily vest in the Dominion Parliament and cannot vest in the provincial Legislature. Not being within the exclusive power of the province, it must fall within the residuary powers of the Dominion. Otherwise it is not subject to any single legislative control. Reference was made to the Act of 1867, s. 91, subss. 29 and 39; *Valin* v. *Langlois* (1); *Cushing* v. *Dupuy* (2); *Citizens Insurance Co.* v. *Parsons* (3); *Bank of Toronto* v. *Lambe* (4); *Attorney-General of Ontario* v. *Attorney-General of Canada* (5); *Union Colliery Co. of British Columbia* v. *Bryden* (6); *Attorney-General for Ontario* v. *Attorney-General for Canada* (7);

[1912] *A. C.* *p.* 336.

(1) (1879) 5 App. Cas. 115, 118.
(2) (1880) 5 App. Cas. 409, 415, *ante*, p. 253.
(3) (1881) 7 App. Cas. 96, 109, *ante*, p. 267.
(4) (1887) 12 App. Cas. 575, 579, *ante*, p. 378.
(5) [1894] A. C. 189, 200, *ante*, p. 447.
(6) [1899] A. C. 580, 585, *ante*, p. 564.
(7) [1896] A. C. 349, 359, 366, *ante*, p. 481.

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Canadian Pacific Ry. Co. v. *Corporation of Notre Dame de Bonsecours* (1); *Grand Trunk Ry. Co.* v. *Attorney-General of Canada* (2); *Madden* v. *Nelson, &c. Ry. Co.* (3); *Toronto Corporation* v. *Canadian Pacific Railway* (4); *Tennant* v. *Union Bank of Canada* (5).

Newcombe, K.C., for the Dominion of Canada, whose Attorney-General intervened by special leave for the purpose only of maintaining its legislative authority to enact the sub-section impugned. He contended that it affected the peace, order, and good government of Canada within the meaning of s. 91 in relation to matters not exclusively assigned to the provinces; and also that it was in pursuance of an exclusive power to legislate with regard to the regulation of trade and commerce. Its admitted powers over the Federal railway in these respects involved the right to deal with the provincial railway and could not be effectively exercised without it. Through traffic by two railways, one of which is federal, cannot be carried on upon terms inconsistent with the Railway Act. It cannot be regulated by the local Legislature and therefore must be governed by the paramount powers of the Dominion. Through traffic is not local and private, and when it affects Dominion railways becomes of such dimension irrespective of its actual character and volume as to affect the body politic of Canada and necessarily falls within the authority of its Parliament. He referred to *Gibbons* v. *Ogden* (6), per Marshall, C.J., as to regulation of trade and commerce; *Kidd* v. *Pearson* (7); *Norfolk and Western Railroad Co.* v. *Pennsylvania* (8); *Hanley* v. *Kansas City Southern Ry. Co.* (9). He also referred to *Union Colliery Co. of British Columbia* v. *Bryden* (10) and *Hodge* v. *The Queen* (11).

[1912] *A. C.* p. 337.

Sir R. Finlay, K.C. (*F. E. Meredith, K.C.*, and *G. Lawrence* with him), for the respondents, contended that it was not necessarily or even reasonably incidental to the exercise of legislative power over a Dominion railway to legislate for through traffic between it and a provincial railway whilst that traffic is on the provincial railway. It has not been made out that control over the Dominion railway is rendered ineffective without this latter power. The sub-section in question does not deal with the control of the Dominion railway or the traffic thereon.

(1) [1899] A. C. 367, 377, *ante*, p. 558.
(2) [1907] A. C. 65, 67, *ante*, p. 636.
(3) [1899] A. C. 626, *ante*, p. 571.
(4) [1908] A. C. 54, *ante*, p. 653.
(5) [1894] A. C. 31, *ante*, p. 443.
(6) (1824) 22 U. S. 1, 68, 78.
(7) (1888) 128 U. S. 1.
(8) (1890) 136 U. S. 396.
(9) (1903) 187 U. S. 617.
(10) [1899] A. C. 585, *ante*, p. 564.
(11) (1883) 9 App. Cas. 117, 130, *ante*, p. 333.

It purports to control the traffic on a provincial railway. The power of the Dominion to reduce rates on the Federal railway is not disputed, and it can exercise that power without at the same time reducing rates on the respondents' railway. That railway is a local work within s. 92, sub-s. 10, of the Act of 1867. It does not connect any two provinces. It has not been declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces. The section in question ought to be applied only to provincial railways which connect with railways extending beyond the limits of the province. The respondents' railway is situate wholly within the province. The two railways connect at points within the province. Neither of them is authorized to construct lines or other works outside the province, and neither of them connects with any railway outside the province. He referred to s. 92, sub-s. 10, and to *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), which for the first time introduced the test of national importance, and the Railway Act, s. 26, sub-ss. 1 and 2, s. 264, and s. 284, sub-ss. 1, 2, 3. The argument in favour of the appeal involves the bringing of all these provisions which relate to through traffic to bear on all provincial railways which are in any way connected, however slightly, with a Dominion railway.

[1912] *A.C.* p. 338.

Geoffrion, K.C. (*Hamar Greenwood* and *Horace Douglas* with him), for the Attorney-General of Quebec, argued to the same effect.

Newcombe, K.C., replied.

The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal by special leave from a judgment of the Supreme Court of Canada pronounced upon March 11, 1910, whereby an appeal from a certain Order of the Board of Railway Commissioners for Canada, dated May 4, 1909, was allowed, the said Order set aside, and it was declared that the said Commissioners had no jurisdiction to make the Order appealed from.

The facts of the case are few and are undisputed.

There are in the city of Montreal and the adjacent township two so-called railways. One of these is the Montreal Park and Island Railway, hereafter styled for convenience the Park Railway, and the other the Montreal Street Railway, which is in

(1) [1896] A. C. 349, 360, *ante*, p. 481.

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fact a tramway laid along the streets of that city and its suburbs, and for convenience may be styled the Street Railway. These railways being constructed on the island in the St. Lawrence on which the city of Montreal stands are, of course, situate wholly within the Province of Quebec. They connect physically at several points both within and near the limits of the city, and arrangements have been entered into between the companies owning them by which the cars of each railway run over the lines of the other, and passengers are conveyed from points on one system to points on the other over the permanent way of both. It is not disputed that there is conducted over these lines "through traffic" within the meaning of the statute hereinafter referred to.

[1912] *A. C.* *p.* 339.

The Park Railway, though originally constructed and worked under the powers conferred by certain enactments of the provincial Legislature, was, by a statute of the Canadian Parliament (57 & 58 Vict. c. 84), amended by two other similar statutes (59 Vict. c. 28 and 6 Edw. 7, c. 129), declared to be a work for the general advantage of Canada. Railways so declared were in this case called "federal" railways to distinguish them from railways situate wholly within a province, and under the exclusive control of the provincial Legislature styled provincial railways. It is admitted that by this declaration the railway to which it refers was withdrawn from the jurisdiction of the provincial Legislature, that it passed under the exclusive jurisdiction and control of the Parliament of Canada, and, small and provincial though it was, stood to the latter in precisely the same relation, as far as the enactments upon the true construction of which this case turns, as do those great trunk lines, also federal railways, which traverse the Dominion from sea to sea, and were originally constructed and are now worked in exercise of the powers conferred by the statutes of the Parliament of the Dominion of Canada. The Board of the Railway Commissioners was created by a Dominion statute (3 Edw. 7, c. 58) entitled "The Railway Act." The Commissioners are officials of the Dominion Government, and in the exercise of their powers are outside the jurisdiction and beyond the control of any provincial Legislature or Government.

A complaint having been made to them that an unjust discrimination had been made by the Park Railway Company in respect of the rates charged and of the service and operation of this railway between the residents of a certain ward in the city of Montreal, named the Mount Royal Ward, and the

residents of an outlying township, named the town of Notre Dame de Grace, in both of which localities they have stations, the Order appealed from was made. It purported to have been made under the authority and by virtue of the powers conferred upon the Commissioners by the Railway Act. By it they directed, first, that the Park Railway Company should grant the same "facilities in the way of services and operation including the rates to be charged by it," to the people residing in Mount Royal Ward as it grants to those residing in Notre Dame de Grace, and that it should forthwith enter into the necessary agreements for the purpose of removing the unjust discrimination which they had found in fact to exist; and, secondly, that with respect to "through" traffic over the Street Railway, the Street Railway Company should "enter into any agreement or agreements that may be necessary to enable" the former company to carry out the provisions of this Order.

[1912] *A. C.* p. 340.

The Park Railway having by statutory declaration become in the manner mentioned a federal railway, it is admitted that the first portion of this Order dealing with the "unjust discrimination" which it was found to have made was intra vires, but the validity of the second part of the Order is challenged, and it has, on behalf of the Street Railway Company, been from the first insisted that the Commissioners had no jurisdiction whatever to make it.

Moreover, it is practically not disputed that the existence in the Commissioners of the jurisdiction challenged depends itself upon this further consideration, namely, whether, having regard to the provisions of the 91st and 92nd sections of the British North America Act, the Parliament of Canada have any jurisdiction, power, or authority, express or implied, to enact the 8th section of the before-mentioned Railway Act so far as it affects provincial as distinguished from federal lines. This was in effect the question of law raised by way of appeal from the Order of the Commissioners for the decision of the Supreme Court. It is by the Order of the former body, dated June 8, 1909, framed thus: "Whether upon the true construction of sections 91 and 92 of the British North America Act, and of section 8 of the Railway Act of Canada, the Montreal Street Railway is subject in respect of its through traffic with the Montreal Park and Island Railway Company, to the jurisdiction of the Board of the Railway Commissioners of Canada."

It is to be observed that the question is framed in a general form. The jurisdiction of the Commissioners or of the Dominion

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[1912] A. C. p. 341.

Parliament is not made to depend in any way on the character, nature, or volume of the "through" traffic. Nor upon the question whether it is of such a kind as to confer special advantages upon Canada or upon two or more of its provinces. And, indeed, counsel on behalf of the appellants at the hearing before their Lordships boldly contended that once a line of railway, though wholly provincial, i.e., situate wholly within one particular province, and not federal, connects with a federal line, and "through" traffic is conducted over both, the jurisdiction of the Commissioners attaches at least so far as this "through" traffic, whatever its character or amount, is concerned.

The Supreme Court by a majority of its members answered the question so put to them in the negative. The question for the decision of their Lordships is whether their answer is right in point of law.

The 8th section of the Railway Act runs as follows:—

"Every railway, steam, or electric street railway or tramway, the construction or operation of which is authorized by special Act of the Legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to—

"(*a*) The connection or crossing of one railway or tramway with or by another, so far as concerns the aforesaid connection or crossing;

"(*b*) The through traffic upon a railway or tramway and all matters appertaining thereto;

"(*c*) Criminal matters, including offences and penalties; and

"(*d*) Navigable waters:

"Provided that, in the case of railways owned by any provincial Government, the provisions of this Act with respect to through traffic shall not apply without the consent of such Government."

It will be observed that if the argument of the appellants be right this section would seem to subject a provincial railway authorized by an Act of the provincial Legislature to all the provisions of this statute of the Canadian Parliament dealing not only with the physical connection or crossing of the two lines and with the through traffic, but also with criminal matters, offences, and penalties, whether connected with the through traffic or not, and further with the relations of the provincial line and its traffic with navigable waters. As to all these matters the jurisdiction and control of the local Legislature is superseded or

overborne, comparatively little is left to that authority, and the line itself is placed in this unfortunate position, that its local traffic is put under the jurisdiction and control of the provincial Legislature and the officials of the local Government, and its through traffic, with all these other matters, is subjected to the jurisdiction and control of the Dominion Legislature and the officials of the Dominion Government. A most unworkable and embarrassing arrangement.

[1912] *A. C.* *p.* 342.

Now the effect of sub-s. 10 of s. 92 of the British North America Act is, their Lordships think, to transfer the excepted works mentioned in sub-heads (*a*), (*b*), and (*c*) of it into s. 91, and thus to place them under the exclusive jurisdiction and control of the Dominion Parliament.

These two sections must then be read and construed as if these transferred subjects were specially enumerated in s. 91, and local railway as distinct from federal railway were specifically enumerated in s. 92.

The matters thus transferred are:

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings, connecting the province with any other province or provinces, or extending beyond the limits of the province.

(*b*) Lines of steamships between the province and any British or foreign country.

(*c*) Works, wholly situate within the province, but declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces.

These works are physical things, not services. The appropriate number of the group would probably be 29 or 29 (*a*). It has accordingly been strongly urged on behalf of the respondents that if it be desirable in the interest of the Dominion to place the through traffic on a provincial line, such as the Street Railway, under the control of the Railway Commissioners, owing to its nature, character, or amount, the proper course for the Dominion Parliament to take, and the only course it can legitimately take, is by statutory declaration to convert the provincial line into a federal line, thus removing it from the class of subjects placed under the control of the Legislature of the province, and placing it amongst the classes of subjects over which it has itself exclusive jurisdiction and control. And further, that there is nothing in the British North America Act to shew that such an invasion of the rights of the provincial Legislature, as is necessarily involved in the establishment of this embarrassing dual control over their

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own provincial railways, was ever contemplated by the framers of the British North America Act. It has, no doubt, been many times decided by this Board that the two sections 91 and 92 are not mutually exclusive, that the provisions may overlap, and that where the legislation of the Dominion Parliament comes into conflict with that of a provincial Legislature over a field of jurisdiction common to both the former must prevail; but, on the other hand, it was laid down in *Attorney-General of Ontario* v. *Attorney-General of the Dominion* (1)—(1.) that the exception contained in s. 91, near its end, was not meant to derogate from the legislative authority given to provincial Legislatures by the 16th sub-section of s. 92, save to the extent of enabling the Parliament of Canada to deal with matters, local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in s. 91; (2.) that to those matters which are not specified amongst the enumerated subjects of legislation in s. 91 the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial Legislature by s. 92; (3.) that these enactments, ss. 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in s. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in s. 92; (4.) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by s. 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; and, lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in s. 91, namely, the regulation of trade and commerce. Taken in their widest sense these words would

[1912] *A. C. p.* 344.

(1) [1896] A. C. 348, *ante*, p. 491.

authorize legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in s. 92, and would seriously encroach upon the local autonomy of the province. In their Lordships' opinion these pronouncements have an important bearing on the question for decision in the present case, though the case itself in which they were made was wholly different from the present case, and the decision given in it has little if any application to the present case. They apparently established this, that the invasion of the rights of the province which the Railway Act and the Order of the Commissioners necessarily involve in respect of one of the matters enumerated in s. 92, namely, legislation touching local railways, cannot be justified on the ground that this Act and Order concern the peace, order, and good government of Canada nor upon the ground that they deal with the regulation of trade and commerce.

It follows, therefore, that the Act and Order if justified at all must be justified on the ground that they are necessarily incidental to the exercise by the Dominion Parliament of the powers conferred upon it by the enumerated heads of s. 91. Well, the only one of the heads enumerated in s. 91 dealing expressly or impliedly with railways is that which is interpolated by the transfer into it of sub-heads (*a*), (*b*), and (*c*) of sub-s. 10 of s. 92. Lines such as the Street Railway are not amongst these.

In other words, it must be shewn that it is necessarily incidental to the exercise of control over the traffic of a federal railway, in respect of its giving an unjust preference to certain classes of its passengers or otherwise, that it should also have power to exercise control over the "through" traffic of such a purely local thing as a provincial railway properly so called, if only it be connected with a federal railway. The Commissioners have by the 317th section of the Railway Act vast powers over federal railways. They can compel the companies who own such lines to make all the arrangements therein mentioned for receiving and forwarding traffic of all kinds, through or local, and also compel them to conduct their business so as not to give an unjust preference to any person or persons or body or bodies corporate; but it is not to be assumed that the provincial railway companies would in the reasonable conduct of their business refuse to make such agreements with federal railway companies as would enable the latter to discharge the obligations which might be placed upon them under this section, and still less is it to be assumed that the provincial Legislature would fail to exercise their own legislative powers to compel recalcitrant companies over which

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they had control to enter into such agreements if they refuse to do so. As long as it is reasonably probable that the provincial companies will enter into such agreements, or will be coerced to enter into them by the provincial Legislature which controls them, it cannot be held, their Lordships think, that it is necessarily incidental to the exercise by the Dominion Parliament of its control over federal railways that provincial railways should be coerced by its legislation to enter into these agreements in the manner in which it sought to coerce the Street Railway Company in the present case to enter into the agreements specified in the order appealed from. There is not a suggestion in the case that the "through" traffic between this federal and this local line, or between any other federal or local line, had attained such dimensions before this Railway Act was passed as to affect the body politic of the Dominion. If it had been so, the ready way of protecting the body politic was by making such a statutory declaration in any particular case or cases as was made in reference to the Park line. The right contended for in this case is in truth the absolute right of the Dominion Parliament wherever a federal line and a local provincial line connect to establish, irrespective of all consequences, this dual control over the latter line whenever there is through traffic between them, at least of such a kind as would lead to unjust discrimination between any classes of the customers of the former line. In their Lordships' view this right and power is not necessarily incidental to the exercise by the Parliament of Canada of its undoubted jurisdiction and control over federal lines, and is therefore, they think, an unauthorized invasion of the rights of the Legislature of the Province of Quebec.

[1912] *A. C.* *p.* 346.

One of the arguments urged on behalf of the appellants was this: The through traffic must, it is said, be controlled by some legislative body. It cannot be controlled by the provincial Legislature because that Legislature has no jurisdiction over a federal line, therefore it must be controlled by the Legislature of Canada. The answer to that contention is this, that so far as the "through" traffic is carried on over the federal line, it can be controlled by the Parliament of Canada. And that so far as it is carried over a non-federal provincial line it can be controlled by the provincial Legislature, and the two companies who own these lines can thus be respectively compelled by these two Legislatures to enter into such agreement with each other as will secure that this "through" traffic shall be properly conducted; and further that it cannot be assumed that either body will decline to

co-operate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the province as the regulation of "through" traffic.

On the whole, therefore, their Lordships are of opinion that s. 8, sub-s. (*b*), of the Railway Act is, as regards provincial lines of railway properly so called, ultra vires (upon the other sub-sections it is unnecessary to express any opinion); that the Order of the Commissioners of May 4, 1909, was, in respect of its second part, made without jurisdiction; that the decision of the Supreme Court was right, and that this appeal should be dismissed with costs. The intervenants will pay any costs incurred owing to the interventions. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Botterell & Roche.*

Solicitors for Attorney-General of Canada: *Charles Russell & Co.*

Solicitors for Attorney-General of Quebec: *Withers, Bensons, Birkett & Davies.*

ONTARIO *v.* CANADA (COMPANIES REFERENCE) [1912], A. C. 571.

ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO AND OTHERS . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA AND ANOTHER . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867—*Policy of the Act—Legislation authorizing the putting of Questions to the Courts—Intra vires both of the Dominion and the Provinces.*

In 1875, 1891, and 1906 Acts were passed by the Dominion Parliament authorizing the Executive Government of the Dominion to obtain by direct request answers from the Supreme Court of Canada on questions both of law and fact; and nearly all the provinces have passed Acts in similar terms requiring their own Courts to answer questions put by the provincial Governments:—

Held, that it was intra vires of the respective Legislatures to impose this duty on the Courts. Though powers to that effect were not granted in express terms by the British North America Act, 1867, they were not repugnant

* *Present*:—EARL LOREBURN, L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

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thereto, but incidental to the complete self-government of Canada which was contemplated by that Act. The answers are only advisory, and by giving them it cannot be said that a Court ceases to be such a judiciary as the Act provides for (1).

Appeal from a judgment of the Supreme Court of Canada (October 11, 1910), reported in 43 S. C. R. 536, dismissing a motion to strike the inscription of this and two other references from the list upon the ground of want of jurisdiction.

The question raised by the appeal was whether under the Canadian Constitution the Governor-General in Council has power to frame and refer to the Supreme Court questions as to the constitutional powers of the provinces, as to the effect of provincial statutes, and as to the interests of individuals who may be unrepresented upon such reference, and to require the Supreme Court to answer such questions.

The appellants contended that the Governor-General in Council had no such power, and that the reference in question, which so far as material to this appeal related to the powers inter se of the Dominion and provincial Legislatures to incorporate companies, and to the effect of such incorporation having been made without the consent and against the protest of the provinces concerned, could not be entertained by the Supreme Court.

The particular reference now in question was made by the Governor-General to the Supreme Court of Canada for hearing and consideration of certain questions of law in relation to the incorporation of companies and other particulars as therein stated. It was made under the authority of s. 60 of the Supreme Court Act, R. S. C., 1906, c. 139, which is as follows:—

"60. Important questions of law or fact touching,—

"(*a*) the interpretation of the British North America Acts, 1867 to 1886; or

"(*b*) the constitutionality or interpretation of any Dominion or provincial legislation; or,

"(*c*) the appellate jurisdiction as to educational matters, by the British North America Act, 1867, or by any other Act or law vested in the Governor in Council; or,

"(*d*) the powers of the Parliament of Canada, or of the Legislatures of the provinces, or of the respective Governments thereof, whether or not the particular power in question has been or is proposed to be executed; or,

(1) Aff. *British Columbia* v. *Canada*, *post*, p. 777.

"(*l*) any other matter, whether or not in the opinion of the Court ejusdem generis with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;

may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question."

Various sub-sections follow which prescribe the mode of dealing with the reference so made, and sub-s. 6 enacts: [1912] *A. C.* *p.* 573.

6. "The opinion of the Court upon any such reference although advisory only shall for all purposes of appeal to His Majesty in Council be treated as a final judgment of the said Court between parties. 54 & 55 Vict. c. 25, s. 4; 6 Edw. 7, c. 50, s. 2."

The Attorney-General of each of the provinces was notified of the hearing of this reference pursuant to an order of Idington, J.

The original Supreme Court Act was passed in 1875, being 38 Vict. c. 11. It was re-enacted in substance in 1886 by R. S. C., 1886, c. 135, amended in 1891 by 54 & 55 Vict. c. 25, and again by 6 Edw. 7, c. 50, and finally re-enacted by R. S. C., 1906, c. 139.

The said order of dismissal was made by a Full Court (Fitzpatrick, C.J., Davies, Duff, and Anglin, JJ., Girouard and Idington, JJ., dissenting).

The Chief Justice was of opinion that the Court should entertain the reference and answer the questions on the grounds: (*a*) That precedent had been established therefore by the numerous previous cases in which the Court had answered such questions in the past, some of the answers to which had been appealed to the Judicial Committee of the Privy Council, which assumed that it had jurisdiction to deal with them: (*b*) that independently of precedent it was the duty of the judges of the Supreme Court of Canada to advise the Executive Government in analogy to the procedure by which the judges in England have often been called to give their opinions on points of law: that this was sufficiently provided for by s. 3 of the Supreme Court Act by which the Court was established under the authority of s. 101 of the British North America Act, 1867, by the Parliament of Canada "as a general Court of Appeal for Canada and as an additional Court for the better administration of the laws of Canada," and that, quoting the words of the Chief Justice, "we are asked to answer [1912] *A. C.* *p.* 574.

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certain questions submitted to us by the Executive for the express purpose of obtaining information which may assist in the administration of the fundamental law of the Canadian Constitution, the British North America Act"; (c) that as to the constitutionality of the provisions of the Supreme Court Act under which the references were made, Parliament had the necessary legislative jurisdiction under s. 91 of the British North America Act, 1867, which provides that the Parliament of Canada may from time to time make laws for the peace, order, and good government of Canada in relation to all matters not coming within the class of subjects assigned exclusively to the legislation of the provinces; and that if Parliament possess the power, that power is vested in the Executive.

Davies, J., agreed with the Chief Justice in thinking that s. 60 of the Supreme Court Act was authorized by s. 101 of the British North America Act as being the establishment of an additional Court for the better administration of the laws of Canada, and that in any event it was authorized by the general provision of s. 91. He considered that there was no necessary conflict between the powers assigned to the provincial Legislatures under s. 92, sub-s. 14, of the British North America Act and the power claimed by the Dominion of Canada to refer questions to the Supreme Court under s. 60 of the Supreme Court Act, and further, that even if there was any such conflict the words "Notwithstanding anything in this Act," at the beginning of s. 101 of the British North America Act, indicate that it was the intention of the Imperial Parliament to override s. 92, sub-s. 14, by s. 101.

The opinions of Duff and Anglin, JJ., were substantially to the same effect.

Girouard, J., was of opinion that the jurisdiction of the Court in references by the Governor-General was confined to Federal matters, and that in so far as the subject-matter of this reference was provincial it was ultra vires of the Governor-General in Council and beyond the jurisdiction of the Court.

Idington, J., was of opinion that s. 101 of the British North America Act, besides authorizing the establishment of a general Court of Appeal for Canada, authorized the creation of additional Courts for the better administration of Federal laws. He held that whilst the Supreme Court had jurisdiction in references in which both the provinces and the Dominion have agreed in submitting the questions asked, it had no jurisdiction to entertain references by the Dominion authorities of questions affecting the provinces without their consent and against their wish.

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On March 4, 1911, an Order in Council granted special leave to appeal against the said opinion or judgment. The appellants were the Attorneys-General for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta. The respondents were the Attorney-General for the Dominion and the Attorney-General for the Province of British Columbia. The latter of the two did not appear.

Sir R. Finlay, K.C., *Nesbitt, K.C.*, and *Geoffrey Lawrence*, for the appellants, contended that the Governor-General in Council had no power to refer to the Supreme Court questions which affect the interests of the provinces without obtaining their consent to such reference. On the true interpretation of the British North America Act, 1867, it appears that s. 91, sub-s. 27, and ss. 96–101 expressly and exhaustively define the powers of the Dominion Parliament as to the administration of justice. It is inadmissible to imply further powers and regard those further powers as vested by the statute in the Court. If s. 60 of the Supreme Court Act (R. S. C., 1906, c. 139) authorizes the reference in question it is ultra vires of the Dominion Parliament. That Act and its predecessors constituted the Supreme Court as a general Court of Appeal for Canada. Sect. 60, however, purports to create a Court not as a general Court of Appeal nor for the administration of the laws of Canada, but as a branch of the Executive Government, an advisory committee for the purpose of advising the Executive upon any question which the Governor-General sees fit to refer to it. The giving of such advice is no part of the administration of the law, and it would necessarily include, inter alia, advice upon the legislation of the Imperial Parliament and of the various provincial Legislatures in Canada. So far from aiding in the administration of law it may easily be so used as to hamper and interfere with that administration. The points involved in such references may afterwards arise in the course of legal proceedings between private suitors or between the provinces and the Dominion. The duty would then be cast on the provincial Courts and ultimately on the Supreme Court of deciding such points according to law. It was contended that it would or might be highly prejudicial to the administration of justice that the members of the Supreme Court should have been previously required to express opinions upon any such points until they actually arose for adjudication and had been argued before them. It was contended that the Dominion Parliament had no power to impose upon the Supreme Court the obligation to express extra-

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judicial opinions on matters which might thereafter come judicially before them. The obligation is inconsistent with the primary duty of the Court and the purpose for which it was created, namely, the administration of law. So far as that administration is impeded or overridden by the obligation imposed by s. 60 the Court ceases to be such a judiciary as the Constitution provides for, and it was ultra vires of the Dominion so to enact. The appellants on behalf of the provinces contended that that obligation conflicts with the powers assigned to provincial Legislatures by s. 92, sub-s. 14, of the British North America Act, 1867. Under that sub-section everything which relates to the administration of justice in the province is assigned exclusively to the Legislature of the province. It is not competent for the Dominion to interfere therewith under the authority of the general power of its Parliament to make laws for the peace, order, and good government of Canada. The scope and intention of that Act of 1867 was to effect a division of legislative powers between the Dominion and the provinces, giving to each as far as possible exclusive legislative authority in its own sphere. In the absence of express words it could not have been intended that either the Dominion or the provinces should have the power of calling in question the legislative competency of the other by referring to the Courts of law hypothetical or other questions framed ex parte.

The questions propounded in this reference were designed to obtain the opinion of the Supreme Court on the question whether companies incorporated under provincial statutes have power or capacity to do business outside the limits of the incorporating province. It was contended that the answers to such questions would or might affect the standing of a great number of companies incorporated by the provinces since the confederation in 1867 and now carrying on business in two or more provinces. They might also affect the legislative control over companies incorporated in the several provinces prior to their entry into confederation. These are obviously questions of vital importance to the appellants, who were not consulted as to the framing of them. Previous references had been made with the consent of the provinces, and so the question of jurisdiction had never before been raised or decided.

[1912] A. C. p. 577

With regard to the practice which has obtained in England of putting questions upon matters not in litigation to the Judicial Committee, the House of Lords, and His Majesty's judges, and which was relied upon by the judges of the Supreme Court, it was contended that that practice had grown up under an unwritten

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Constitution, whereas the validity of the practice which had grown up in Canada depends upon the construction of a written Constitution, namely, the British North America Act, 1867, and the Supreme Court Acts. With regard to the House of Lords and His Majesty's judges the cases referred to were *In re Westminster Bank* (1); *M'Naghten's Case* (2); *O'Connell* v. *Reg.* (3). The practice observed in those cases afforded no guide to the construction of the British North America Act, although 3 & 4 Will. 4, c. 41, s. 4, seems to have suggested its introduction into Canada. The practice which has grown up under the British North America Act and the various Acts constituting the Supreme Court is more important, and it was contended that on examination it resulted that every previous reference under s. 60 of the Act of 1906 or its corresponding predecessor in the earlier Acts had been made with the consent of the provinces concerned. In consequence the question of jurisdiction raised in this case had not previously been submitted or decided. The cases referred to were *In re Sproule* (4); certain references as to the status of the Supreme Court of British Columbia and under the Liquor Laws Amendment Act, 1883, s. 26, to be found in Coutlée's Supreme Court Digest, vol. 1, col. 273 and col. 797: *In re County Courts of British Columbia* (5); *In re Certain Statutes of the Province of Manitoba relating to Education* (6), and on appeal, *Brophy* v. *Attorney-General of Manitoba* (7); *In re Prohibitory Liquor Laws* (8), and on appeal, *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (9); *In re Provincial Fisheries* (10), and on appeal, *Attorney-General for the Dominion* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia* (11); *In re Representation in the House of Commons* (12), and *In re Representation of P.E.I. in the House of Commons* (13), and on appeal, *Attorney-General for Prince Edward Island* v. *Attorney-General for the Dominion* (14); *In re Railway Act* (15), and on appeal, *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (16). Reference was also made to *In re Criminal Code Sections relating to Bigamy* (17) and *In re Criminal Code* (18); to an Australian case, *McLeod* v. *Attorney-*

[1912] *A. C.* p. 578.

(1) (1834) 2 Cl. & F. 191.
(2) (1843) 10 Cl. & F. 200.
(3) (1844) 11 Cl. & F. 155.
(4) (1886) 12 Can. S. C. R. 140.
(5) (1892) 21 Can. S. C. R. 446.
(6) (1894) 22 Can. S. C. R. 577.
(7) [1895] A. C. 202, *ante*, p. 457.
(8) (1895) 24 Can. S. C. R. 170.
(9) [1896] A. C. 348, *ante*, p. 481.
(10) (1895) 26 Can. S. C. R. 444.
(11) [1898] A. C. 700, *ante*, p. 542.
(12) (1903) 33 Can. S. C. R. 475.
(13) (1903) 33 Can. S. C. R. 594.
(14) [1905] A. C. 37, *ante*, p. 605.
(15) (1905) 36 Can. S. C. R. 136.
(16) [1907] A. C. 65, *ante*, p. 636.
(17) (1897) 27 Can. S. C. R. 461.
(18) (1910) 43 Can. S. C. R. 434, 441.

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General for New South Wales (1): *In re Legislation respecting Abstention from Labour on Sunday* (2), citing *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (3); *In re International and Inter-provincial Ferries* (4); and to *L'Association St. Jean Baptiste de Montreal* v. *Brault* (5). With regard to any analogy presented by the American Constitution, the President has the right to require the written opinion of his ministers, but not in regard to the judicial department, which is bound to abstain from extra-judicial opinions upon points of law even though solemnly requested by the Executive: see Story on the Constitution of the United States, s. 1571, note 2, and *Marbury* v. *Madison* (6). Sect. 91 of the British North America Act, 1867, gives to the Dominion wide general powers, but it was contended that they must be read so as to harmonize with s. 101, which is almost identical with provisions in the American Constitution.

[1912] *A. C.* p. 573.

E. L. Newcombe, K.C., and *Atwater, K.C.*, for the Dominion of Canada, contended that the judgment of the Supreme Court was right. The reference to the Supreme Court and this appeal simply involve a question of jurisdiction derived from the enacting clauses of the British North America Act. In other words, it was contended that s. 60 of the Supreme Court Act is within the legislative authority of the Dominion Parliament under the British North America Act, either under s. 91 or s. 101. The powers conferred by s. 60 did not conflict in any way with the powers and rights reserved exclusively to the provincial Legislatures by s. 92 of the Act of 1867. The legislation of the Parliament of Canada authorizing the reference of questions in the manner adopted in this case has been in force ever since the constitution of the Supreme Court in 1875: see 38 Vict. c. 11, s. 52. The power so conferred has been acted upon in many cases, as shewn by the authorities cited on the other side. There has thus arisen a long series of precedents already laid before the Board for the answering of such questions not only by the Supreme Court, but also on appeal by the Judicial Committee. Reference was also made to *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (7). *Grand Trunk Pacific Ry. Co.* v. *Rex*, decided last month (8), was referred by the Governor-General of Canada. Further

(1) [1891] A. C. 455.
(2) [1903] 33 Can. S. C. R. 581.
(3) [1903] A. C. 524, *ante*, p. 600.
(4) [1905] 35 Can. S. C. R. 206.
(5) [1901] 31 Can. S. C. R. 172.
(6) (1803) 1 Cranch. 137, 171.
(7) [1907] A. C. 65, *ante*, p. 636.
(8) [1912] A. C. 204.

similar legislation has been enacted by the provincial Legislatures, or most of them, authorizing the provincial Governments to put questions of law or fact otherwise than by litigation to the chief Courts of jurisdiction within their respective provinces. Reference was made to Revised Statutes of Nova Scotia, vol. 2, c. 166, p. 709, entitled Of the Decision of Constitutional and other Provincial Questions; to Revised Statutes of Ontario, 1897, c. 84; Revised Statutes of Quebec, 1909, vol. 1, arts. 579–583; New Brunswick Cons. St. 1903, c. 18; New Brunswick Judicature Act, 1906; Acts of 1909, c. 5, s. 16; Revised Statutes of Manitoba, 1902, c. 33; Revised Statutes of British Columbia, 1911, c. 45; R. S. Saskatchewan, c. 57. Reference was also made to cases from the provinces where the authority to put the questions was undisputed while the duty of the Court to answer them was sometimes brought under discussion. See *In re Legislation respecting Abstention from Labour on Sunday* (1), where Blackstock, K.C., raised objections to the hearing of the questions, p. 587, but not to the power of Parliament to authorize the putting of them. See also *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (2) and *Attorney-General for the Dominion* v. *Attorney-General for Ontario* (3).

[1912] A. C. p. 580.

There is no inconvenience resulting from the practice of the judges giving advisory opinions. On the contrary it is a proceeding of utility, if not a necessity, in the determination of the various constitutional difficulties arising in the construction of the British North America Act. Advisory jurisdiction is within the functions of a Court of law, which need not be for all purposes indistinguishable from a Court of justice: see judgment of Fry, L.J., in *Royal Aquarium, &c., Society* v. *Parkinson* (4). Reference was also made to the judgment of Dr. Lushington in *In re Schlumberger* (5), as to questions referred under 3 & 4 Will. 4, c. 41. See also *Ex parte County Council of Kent and Council of Dover* (6); *Crown Grain Co., Ld.* v. *Day* (7). As to the construction of the general powers given to the Dominion Parliament by s. 91 of the Act of 1867, see *Valin* v. *Langlois* (8); *Bank of Toronto* v. *Lambe* (9); *Brophy* v. *Attorney-General of Manitoba* (10). The Court, if it considered that its answers to the questions put might prejudicially affect the administration of justice in future cases, might refuse

(1) 35 Can. S. C. R. 581.
(2) [1903] A. C. 524, *ante*, p. 600.
(3) [1898] A. C. 247, *ante*, p. 542.
(4) [1892] 1 Q. B. 431, 446.
(5) (1853) 9 Moo. P. C. 1, 12.
(6) [1891] 1 Q. B. 728, 729.
(7) [1908] A. C. 504, *ante*, p. 658.
(8) (1879) 5 App. Cas. 115, 118.
(9) (1887) 12 App. Cas. 575, 579, *ante*, p. 378.
(10) [1895] A. C. 202, 222, *ante*, p. 427.

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to answer the questions, stating their reasons for so doing, or the Legislature might modify its enactment. The appellants had failed to shew that it was ultra vires of the Dominion Parliament to authorize the Executive Government to put the questions purporting to be authorized by s. 60.

Sir R. Finlay in reply.

The judgment of their Lordships was delivered by

1912 May 16.

[1912] A. C. p. 581

EARL LOREBURN, L.C. The real point raised in this most important case is whether or not an Act of the Dominion Parliament authorizing questions either of law or of fact to be put to the Supreme Court and requiring the judges of that Court to answer them on the request of the Governor in Council is a valid enactment within the powers of that Parliament. Much care and learning have been devoted to the case, and their Lordships are under a deep debt to all the learned judges who have delivered their opinions upon this anxious controversy.

In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation), general terms are necessarily used in describing what either is to have, and with the use of general terms comes the risk of some confusion, whenever a case arises in which it can be said that the power claimed falls within the description of what the Dominion is to have, and also within the description of what the province is to have. Such apparent overlapping is unavoidable, and the duty of a Court of law is to decide in each particular case on which side of the line it falls in view of the whole statute.

In the present case, however, quite a different contention is advanced on behalf of the provinces. It is argued, indeed, that the Dominion Act authorizing questions to be asked of the Supreme Court is an invasion of provincial rights, but not

because the power of asking such questions belongs exclusively to the provinces. The real ground is far wider. It is no less than this—that no Legislature in Canada has the right to pass an Act for asking such questions at all. This is the feature of the present appeal which makes it so grave and far-reaching. It would be one thing to say that under the Canadian Constitution what has been done could be done only by a provincial Legislature within its own province. It is quite a different thing to say that it cannot be done at all, being, as it is, a matter affecting the internal affairs of Canada, and, on the face of it, regulating the functions of a Court of law, which are part of the ordinary machinery of government in all civilized countries.

[1912] A. C. p. 582.

Broadly speaking the argument on behalf of the provinces proceeded upon the following lines. They said that the power to ask questions of the Supreme Court, sought to be bestowed upon the Dominion Government by the impugned Act, is so wide in its terms as to admit of a gross interference with the judicial character of that Court, and, therefore, of grave prejudice to the rights of the provinces and of individual citizens. Any question, whether of law or fact, it was urged, can be put to the Supreme Court, and they are required to answer it, with their reasons. Though no direct effect is to result from the answer so given, and no right or property is thereby to be adjudged, yet, say the appellants, the indirect result of such a proceeding may be and will be most fatal. When the opinion of the highest Court of Appeal for all Canada has been given upon matters both of law and of fact, it is said it is not in human nature to expect that, if the same matter is again raised upon a concrete case by an individual litigant before the same Court, its members can divest themselves of their preconceived opinions: whereby may ensue not merely a distrust of their freedom from prepossession, but actual injustice, inasmuch as they will in fact, however unintentionally, be biassed. The appellants further insist that although the Act in question provides for requiring argument, and directing that counsel shall be heard before the questions are answered, yet the persons who may be affected by the answers cannot be known beforehand, and therefore will be prejudiced without so much as an opportunity of stating their objections before the Supreme Court has arrived at what will virtually be a determination of their rights.

This view, which was most powerfully presented, has a two-fold aspect. It may be regarded as a commentary upon the wisdom of such an enactment. With that this Board is in no

[1912] A. C. p. 583.

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sense concerned. A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor. No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the judges themselves. Such considerations are proper, no doubt, to be weighed by those who make and by those who administer the laws of Canada, nor is any Court of law entitled to suppose that they have not been or will not be duly so weighed. So far as it is a matter of wisdom or policy, it is for the determination of the Parliament. It is true that from time to time the Courts of this and of other countries, whether under the British flag or not, have to consider and set aside, as void, transactions upon the ground that they are against public policy. But no such doctrine can apply to an Act of Parliament. It is applicable only to the transactions of individuals. It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say. All, therefore, that their Lordships can consider in the argument under review is whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the constitutional law of Canada.

In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act. It certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self government, and obviously bestowed by the British North

[1912] A. C. p. 584

America Act. Indeed it might ensue from the breach of almost any power.

Is it then to be said that a power to place upon the Supreme Court the duty of answering questions of law or fact when put by the Governor in Council does not reside in the Parliament of Canada? This particular power is not mentioned in the British North America Act, either explicitly or in ambiguous terms. In the 91st section the Dominion Parliament is invested with the duty of making laws for the peace, order, and good government of Canada, subject to expressed reservations. In the 101st section the Dominion is enabled to establish a Supreme Court of Appeal from the provinces. And so when the Supreme Court was established it had and has jurisdiction to hear appeals from the provincial Courts. But of any power to ask the Court for its opinion there is no word in the Act. All depends upon whether such a power is repugnant to that Act. The provinces by their counsel maintain, in effect, the affirmative. They say that when a Court of Appeal from all the provincial Courts is authorized to be set up, that carries with it an implied condition that the Court of Appeal shall be in truth a judicial body according to the conception of judicial character obtaining in civilized countries and especially obtaining in Great Britain, to whose Constitution the Constitution of Canada is intended to be similar, as recited in the British North America Act, 1867. And they say that to place (1) the duty of answering questions, such as the Canadian Act under consideration does require the Court to answer, is incompatible with the maintenance of such judicial character or of public confidence in it, or with the free access to an unbiassed tribunal of appeal to which litigants in the provincial Courts are of right entitled. This argument in truth arraigns the lawfulness of so treating a Court upon the ground that a Court liable to be so treated ceases to be such a judiciary as the Constitution provides for. The argument on behalf of the provinces was presented substantially as just stated, though not in identical words. But, however presented, no argument which falls short of this could claim serious attention. If, notwithstanding the liability to answer questions, the Supreme Court is still a judiciary within the meaning of the British North America Act, then there is no ground for saying that the impugned Canadian Act is ultra vires.

[1912] *A. C.* p. 585.

In course of the discussion both here and in the Canadian Courts full reference was made to the law and practice observed by the Judicial Committee, by the House of Lords, and His Majesty's judges.

(1) *Sic.*

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It appears that the idea of questions being put by the Executive Government to the Supreme Court of Canada was suggested in the first instance by the 4th section of the Act of William IV. For the earliest Canadian Act on this subject (that of 1875) adopts in effect the words of the 4th section. This analogy, no doubt, has some value, inasmuch as this Committee, exercising most important judicial functions, is undoubtedly liable to be asked questions of any kind by the authority of the Crown, and the procedure is used from time to time, though rarely and with a careful regard to the nature of the reference. On the other hand it must be remembered that the members of the Judicial Committee are all Privy Councillors, bound as such to advise the Crown when so required in that capacity. Upon the whole, it does seem strange that a Court, for such in effect this is, should have been for three-quarters of a century liable to answer questions put by the Crown, and should have done it without the least suggestion of inconvenience or impropriety, if the same thing when attempted in Canada deserves to be stigmatized as subversive of the judicial functions.

In regard to the House of Lords, there is no doubt that, when exercising its judicial functions as the highest Court of Appeal from the Courts of the United Kingdom, that House has a right to summon the judges and to ask of them such questions as it may think necessary for the decision of a particular case. That is a very different thing from asking questions unconnected with a pending cause as to the state or effect of the law in general. But there is also authority for saying that the House of Lords possesses in its legislative capacity a right to ask the judges what the law is, in order to better inform itself how if at all the law should be altered. The last instance of this being done occurred some fifty years ago, when the right was expressly asserted by Lords of undoubtedly high authority. It is unnecessary further to consider this latter claim of the House of Lords, which in fact has very rarely been put to use, because it is a claim resting upon the unwritten law of the Constitution and said to be within the privilege of one branch of the Legislature, whereas the point to be decided in the present appeal is whether under a particular written Constitution a Parliament can entrust to the Executive Government a similar power. Still it has a bearing upon the supposed intrinsic abhorrence with which their Lordships are asked to regard the putting of questions, otherwise than by litigation, to a Court of law.

[1912] *A. C.* *p.* 586.

Very little assistance is afforded by the almost or altogether

obsolete practice of His Majesty's judges in England being questioned by the Crown as to the state of the law, if indeed it can be said that there ever was any legitimate practice of that kind. Since 1760, when Lord Mansfield on behalf of His Majesty's judges did furnish an answer, though with evident reluctance, as to the Crown's right to summon Lord George Sackville before a court-martial, no instance of such a proceeding has been adduced. Earlier practice in bad times is of no weight, and as the unwritten Constitution of England is a growth, not a fabric, it may be that desuetude for 150 years has rendered unconstitutional, in the sense in which that term is understood in England, any attempt to repeat such an experiment. If the point ever arises it must be settled upon the judges of England either assenting or refusing to comply with the request. It will then be a question what is the duty appertaining to their office, which is a very different question from that now before the Board.

It is more to the purpose to consider what has been the practice in Canada under the British North America Act, and how that practice has been regarded by Courts and the Judicial Committee. The needs of one country may differ from those of another, and Canada must judge of Canadian requirements.

[1912] A. C. p. 587.

The first step towards authorizing the Executive Government of the Dominion to obtain the opinion of the Supreme Court by a direct request was taken in 1875 by the Canadian Parliament. By the terms of the 1875 Act, any question might be put to the Supreme Court. Since then, in 1891, and again in 1906, fresh Acts were passed providing for the same thing with more detail though not in wider terms, and it is the 1906 Act which gave rise to the present appeal. Between 1875 and to-day the Supreme Court from time to time has been asked and has repeatedly answered questions put to it in accordance with these Acts of the Canadian Parliament. And it is very important that in six instances, between the years 1875 and 1912, the answers given by that Court have been the subject of appeal to the Judicial Committee under a power to appeal which was comprised in the Canadian Acts, and which gave authority to this Board to entertain such appeals, as though they were appeals from the ordinary jurisdiction. In all cases the appeal was entertained; in some cases the answers of the Supreme Court were modified by their Lordships; and in one case Lord Herschell, delivering the opinion of the Board, declined to answer some of the questions upon the ground that so doing might prejudice particular inte-

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rests of individuals. These circumstances were much and legitimately dwelt upon on behalf of the Canadian Attorney-General as shewing that the Acts now alleged to have been ultra vires were in fact acted upon, and so treated as valid, not only by the Court in Canada, but also on appeal in Whitehall. It was urged on the other hand for the provinces, and with perfect truth, that in no one of these cases was this point ever raised, and that the Judicial Committee would be indisposed to raise it when the parties to the appeal concurred in desiring a determination. It seems that this does not dispose of the argument. The Board would certainly be at all times averse to taking any objection which would hinder the ascertainment of any point of law which the parties desired in good faith to have determined. But it is not easy to believe that, if there is any force in the contention of the now appellants, the Judicial Committee would have so often failed even to advert to a departure so serious as is now maintained from what is due to the independence and character of Courts of justice. It is clear indeed that no such apprehension ever occurred to any of the great lawyers who heard those cases. And that circumstance militates very strongly against the view now put forward, that it is repugnant to the British North America Act and subversive of justice to require the Court to answer questions not in litigation.

[1912] *A. C.* *p.* 588.

Great weight ought also to be attached to another significant circumstance. Nearly all the provinces have themselves passed provincial laws requiring their own Courts to answer questions not in litigation, in terms somewhat similar to the Dominion Act which they impugn. If it be said, as it was said, that s. 101 of the British North America Act forbids this being done by the Dominion Parliament, that argument cannot apply to the provincial Legislatures, because s. 101 does not apply to the provinces. Either, then, these provincial Acts are valid, while a similar Act passed by the Dominion is invalid, which seems very strange, or the provincial Acts as well as that of the Dominion are ultra vires upon the general ground already dwelt upon, that a Court of justice ceases in effect to be a Court of justice when such a duty is laid upon it. Certainly it is remarkable that for thirty-five years this point of view has apparently escaped notice in Canada, and a contrary view, now said to menace the very essence of justice, has been tranquilly acted upon without question by the Legislatures of the Dominion and provinces, by the Courts in Canada, and by the Judicial Committee ever since the British North America Act established the present Constitu-

tion of Canada. It is difficult to resist the conclusion that the point now raised never would have been raised had it not been for the nature of the questions which have been put to the Supreme Court. If the questions to the Courts had been limited to such as are in practice put to the Judicial Committee (e.g., must justices of the peace and judges be resworn after a demise of the Crown?) no one would ever have thought of saying it was ultra vires. It is now suggested because the power conferred by the Canadian Act, which is not and could not be wider in its terms than that of William IV., applicable to the Judicial Committee, has resulted in asking questions affecting the provinces, or alleged to do so. But the answers are only advisory and will have no more effect than the opinions of the law officers. Perhaps another reason is that the Act has resulted in asking a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value. The Supreme Court itself can, however, either point out in its answer these or other considerations of a like kind, or can make the necessary representations to the Governor-General in Council when it thinks right so to treat any question that may be put. And the Parliament of Canada can control the action of the Executive.

[1912] *A. C.* p. 589.

Yet the argument, that to put questions is ultra vires, must be the same whether the power is rightly or wrongly used. If you say that it is intra vires to put some kinds of question, but ultra vires to put other kinds of question, then you will have to draw the line between what may be asked and what may not. That must depend upon what it is judicious or wise to ask, and can in no sense rest upon considerations of law. What in substance their Lordships are asked to do is to say that the Canadian Parliament ought not to pass laws like this because it may be embarrassing and onerous to a Court, and to declare this law invalid because it ought not to have been passed.

Their Lordships would be departing from their legitimate province if they entertained the arguments of the appellants. They would really be pronouncing upon the policy of the Canadian Parliament, which is exclusively the business of the Canadian people, and is no concern of this Board. It is sufficient to point out the mischief and inconvenience which might arise from an indiscriminate and injudicious use of the Act, and leave it to the consideration of those who alone are lawfully and constitutionally entitled to decide upon such a matter (1).

(1) Aff. *British Columbia* v. *Canada*, *post*, p. 777.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

J. C.* 1912 *July* 4, 5, 8, 24.

TORONTO AND NIAGARA CO. *v.* NORTH TORONTO [1912], A. C. 834.

TORONTO AND NIAGARA POWER COMPANY PLAINTIFFS;

AND

CORPORATION OF THE TOWN OF NORTH TORONTO . . . . . } DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Power to erect Electric Wires and Poles in Streets—Municipality has no Right of Veto—Appellants' Incorporating Act, 2 *Edw.* 7, *c.* 107, *ss.* 12, 13, 21—*Railway Act of* 1888, *s.* 90—*Railway Act of* 1906, *s.* 247—*Construction.*

Held, that by ss. 12 and 13 of their incorporating Dominion Act, 2 Edw. 7, c. 107, the appellants were empowered to enter upon the streets of the town of North Toronto without the consent of its municipal council for the purpose of erecting poles to carry power lines for the conveyance of electricity.

Held, further, that s. 90 of the Railway Act of 1888 as amended by the Railway Act of 1899 and by s. 247 of the Railway Act of 1906, the effect of which would be to give the respondents a veto upon the appellants' exercise of their powers, is inconsistent with the said ss. 12 and 13 of the special Act, and consequently by s. 21 thereof is rendered inapplicable to the appellants. Sect. 247, moreover, applies only to companies within the definition clause of the Act of 1906, that is, to railway companies; while ss. 3 and 4 thereof save the appellants' powers under their special Act.

Appeal by special leave from a judgment of the Court of Appeal (February 1, 1912) reversing a judgment of the Chancellor of the High Court (September 29, 1911) and dismissing the appellants' action.

The question decided was whether the appellants are entitled under the powers vested in them by their Act of incorporation (Canadian Act 2 Edw. 7, c. 107) to go upon the streets or highways of the town of North Toronto for the purpose of erecting poles to carry their transmission or power lines for the purpose of selling and distributing electric power.

* *Present:*—VISCOUNT HALDANE, L.C., LORD MACNAGHTEN, LORD DUNEDIN, LORD ATKINSON, and SIR CHARLES FITZPATRICK.

On July 24, 1911, the appellants sued for an injunction to restrain the respondents from interfering with their work along Eglinton Avenue in the said town. The trial judge held that they were entitled as claimed subject to complying with certain requirements of the Railway Act of Canada. The Court of Appeal held that they were not so entitled without the leave and licence of the respondent corporation.

The provisions of the incorporating Act are summarized in their Lordships' judgment.

The trial judge considered that the provision in s. 13 of their Act that the appellants were not to incommode the public use of the streets only applied to the erection of the poles and not to the subsequent transmission of power, and he thought that the appellant company's undertaking to submit to the direction of the engineer of the Railway Board obviated the difficulty arising from the grave danger of stringing high voltage wires over telephone and other low voltage wires. He held that the appellants were bound to deposit a plan and book of reference of their proposed line, but that they did not require any further permission for the occupation of the public streets.

In the Court of Appeal Moss, C.J., after an examination of ss. 12, 18, and 21 of the incorporating Act, s. 90 of the Railway Act of Canada, 1888 (51 Vict. c. 29), and its amendment by 62 & 63 Vict. c. 37, s. 1, re-enacted with additions by s. 195 of 3 Edw. 7, c. 58, and finally by s. 247 of R. S. C., 1906, c. 37, held that there was no inconsistency between the provisions of ss. 12 and 13 of the incorporating Act and those of s. 90 of the Railway Act, 1888, as amended. His decision accordingly was that the appellants were bound to obtain the consent of the respondent corporation before erecting their poles. The remaining judges concurred, Maclaren, J., adding that the question was governed by s. 247 of the Railway Act, 1906, which made it obligatory on the appellants to obtain the respondents' consent and to submit to the supervision of such person as they might appoint subject to an appeal to the Railway Board.

Nesbitt, K.C., *Atkin, K.C.*, and *McCarthy, K.C.*, for the appellants, contended that the powers given to them by their Act of incorporation were full and complete and clearly included a power to erect poles on the highways of the respondent corporation without their consent. The appellants were the first company to undertake the distribution of Niagara power in the Province of Ontario. Their Dominion Act of incorporation gave

[1912] *A. C.* p. 836.

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them special rights to enable them to carry out their undertaking which the Act declared to be for the general advantage of Canada. Sects. 12 and 13 were referred to. It was contended that s. 90 of the Railway Act of 1888 did not apply, for s. 21 of the incorporating Act only rendered it applicable to the appellant company and its undertakings so far as it was not inconsistent with the provisions of the said Act. The ruling of the Court of Appeal that the consent of the municipality was necessary defeated the object and intent of the Dominion Parliament in giving to the appellants their statutory powers. Further the provisions of s. 90, applicable to a railway company possessing powers ancillary to its main object of constructing and maintaining lines for the conveyance of power or electricity, were not intended to apply to a company like the appellants, the main purpose of whose existence was to construct and maintain such lines in order to furnish electricity or power "through over along and across any public highway." Reference was made to *City of Montreal* v. *Standard Light and Power Co.* (1). It was not the intention of the Legislature by that section so completely to cut down the appellants' exercise of their special statutory powers as to make their very existence dependent upon the will of the various municipalities within the territory which they were authorized to supply with electricity. If such intention had existed it would have been clearly expressed by apt words in the special Act. Even if the consent of the municipality were necessary it could not be arbitrarily withheld. No machinery exists for restraining a municipality from arbitrarily or improperly withholding its consent. The Board of Railway Commissioners had no power to interfere, and had so determined in regard to the present contention.

Sir R. Finlay, K.C., and *T. A. Gibson, K.C.*, for the respondents, contended that there was no inconsistency between the provision in s. 90 of the Railway Act of 1888 as amended by s. 195 of the Railway Act of 1903 and s. 247 of the Railway Act of 1906, to the effect that the appellants must obtain the consent of the municipality concerned, and the provisions in ss. 12 and 13 of the appellants' incorporating Act. Consequently s. 90 or its later substitute applies, and therefore the appellant company must as a condition precedent to the exercise of its statutory powers apply for and obtain the consent of the municipality which has jurisdiction over the highway on which they propose to erect their poles and wires. Large powers were given to the

[1912] *A. C.* p. 837.

(1) [1897] A. C. 527.

appellants by their incorporating Act, and it was most necessary that such powers, exercisable as they were in large cities such as Toronto and Montreal, should be exercised under adequate supervision. The respondents were entitled and bound in the interests of public safety to stop the unauthorized erection of poles and electric wires in the town of North Toronto. The appellants should have applied for the respondents' consent; if they had failed to obtain it, they should have applied to the Railway Board. The effect of the sections cited when read together is to give to the respondents in the first instance, and to the Railway Board on appeal, the power to decide whether the proposed poles would incommode the public use of the streets. It was not suggested that the respondents had in order to preserve such public user attempted to impose any unfair conditions on the appellants, in which case there would have been a remedy by appeal to the Railway Board under the incorporated provisions of s. 247 of the Railway Act of 1906.

Nesbitt, K.C., in reply.

The judgment of their Lordships was delivered by

1912
July 24.

VISCOUNT HALDANE, L.C. The question raised by this appeal is whether the appellants may enter upon the streets of the town of North Toronto for the purpose of erecting poles to carry power lines for the conveyance of electricity. Chancellor Boyd, the trial judge, decided that they had such power, but subject to compliance with certain conditions. The Court of Appeal of Ontario reversed his judgment, holding that the appellants had no such power unless they had first obtained the leave and licence of the respondents. The only question which arises is as to the necessity of such leave and licence, and the argument depends entirely upon the construction of certain statutes of the Parliament of Canada. By their Act of incorporation, which was passed by the Parliament of the Dominion in 1902, the appellants were given powers which, if not cut down by other legislation, are sufficient to justify their action. The material provisions of the Act of incorporation may be summarized as follows. By s. 12 the appellants were, among other things, empowered to establish works for the production and sale of electricity, and to construct the lines of wire and poles which they might require. They were enabled to conduct and supply electrical power and to conduct it along wires at any places through, over, along, or across any public highway, and to enter upon any lands on either

[1912] *A. C.* p. 838.

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side of their wires or conduits, and remove trees or other obstructions, as well as to enter on private property and take such parts of it as were necessary for their lines of wire, poles, or conduits. In the event of the company taking private property, which they were empowered to do, certain provisions of the Railway Act, which by a subsequent section were incorporated, were, in case of disagreement or of questions as to damages, to apply.

By s. 13 the appellants were given power to erect poles and construct trenches and conduits and to do all things necessary for the transmission of power, heat, or light, as fully as circumstances might require, provided the same were so constructed as not to incommode the public use of streets, highways, or public places, and they were made responsible for all damage caused by them in the carrying out or maintenance of these works.

By s. 18 the appellants were empowered to make surveys and a map of the lands through or under which these works were to pass or be operated, they were empowered to make a book of reference for the works, and to deposit it, as required by the Railway Act with respect to plans and surveys, by sections or portions less than the whole length of the works, and on such deposit of the map or plan or book of reference of any such section or portion all the sections of the Railway Act were to apply as if the surveys and levels had been taken of the lands through or under which the whole of the works were to pass and the book of reference for the whole had been deposited.

By s. 21, ss. 40 to 61, s. 90, ss. 93 to 98, and ss. 136 to 169 of the then Railway Act, 1888, as amended by the Railway Act, 1899, were to apply to the appellants and their undertakings in so far as these sections were not inconsistent with the provisions of the Act of incorporation, and subject to the provision that wherever in the Railway Act the word "company" occurred it should mean the company by the Act of incorporation incorporated, and that wherever in the Railway Act the word "railway" occurred it should, unless the context otherwise required, and in so far as it applied to the provisions of the Act of incorporation, mean the works, conduits, lines, cables, or other works thereby authorized to be constructed.

[1912] *A. C.* *p.* 839.

The only one of the above sections of the Railway Act which affects this case is s. 90.

The Act of incorporation appears to their Lordships to give to the appellants, unless the powers which it prima facie confers are restricted by the Railway Act, very large powers which entitle the appellants to succeed in the present action. If it can be

taken by itself their Lordships are of opinion that the Act shews that the Parliament of Canada treated the company, the works of which were expressly declared to be for the general advantage of Canada, and so brought within s. 91 of the British North America Act, as proper to be entrusted with freedom to interfere with municipal and private rights. For this there may well have been, on the balance of advantages, good reason—the purpose of the company being to bring electric power from Niagara Falls to parts of Canada, to reach which its lines would have to pass through a series of municipal areas. To make its powers of entry subject to the veto of each municipality might mean failure to achieve its purpose. It is, therefore, not surprising that a pioneer company such as this should have been given large powers.

But while prima facie such powers were given, their Lordships collect from other legislation of the period that the Legislature was fully aware of the difficulties of giving such powers without restriction, and that the question of safeguards was present to the minds of the draftsmen. Companies which had power to bring electrical power and wires into Canadian cities might prove a serious danger to the public. The evidence in the present case shews the peril to the safety and the lives and property of the inhabitants of a populous district which a high voltage, such as that of a power company, might occasion. The Parliament of Canada, not unnaturally anxious to avoid dangers of this kind, accordingly passed general statutes conferring upon municipal authorities large powers of control. Sect. 90 of the Railway Act, 1888, was amended by the Railway Act, 1899, which added to it a sub-section illustrative of this kind of control. The new sub-section enacted that when any company had power by any Act of the Parliament of Canada to construct and maintain lines of telegraph or telephone, or for the conveyance of light, heat, power, or electricity, such company might, *with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place*, enter thereon for the purpose of exercising such power, and break up and open any highway, square, or other public place. Certain further restrictions on the manner of exercise of these powers by the company then follow.

[1912] *A. C.* *p.* 840

If the powers conferred by this section displaced the less restricted powers of entering without any consent conferred by the Act of incorporation the appellants are in the wrong. Their Lordships have, therefore, to determine this question. They

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have to bear in mind that a Court of justice is not entitled to speculate as to which of two conflicting policies was intended to prevail, but must confine itself to the construction of the language of the relevant statutes read as a whole.

The general Railway Act of 1888, as amended by that of 1899, was repealed and re-enacted with some modifications by the Railway Act of 1903, and this Act was in its turn repealed and re-enacted, again with some modifications, by the Railway Act of 1906. The Interpretation Act (R. S. C. 1, s. 20) provides that in such a case any reference in any unrepealed Act (e.g., in the present case the Act of incorporation) to a repealed Act is to be construed as a reference to the provisions of the substituted Act (in this case the Act of 1906), and that, if there is no provision in the substituted Act relating to the same subject-matter, the repealed Act is to stand good and be read as unrepealed in so far, and in so far only, as is necessary to give effect to it.

[1912] *A. C.* *p.* 841.

Turning then to the general Railway Act of 1906 in order to see what light its language throws on the question whether the powers originally conferred in 1902 by the Act of incorporation still stand unrestricted, the first observation to be made is that the draftsman has used language which expresses an intention to save all such powers.

By the definition section (2) "company" means a railway company, and "special Act" means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway. By s. 3 the general Act is to be construed as incorporated with the special Act, and, unless otherwise provided in the general Act, where the provisions of the general Act and of any special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the special Act shall, in so far as is necessary to give effect to such special Act, be taken to override the provisions of the general Act. By s. 4, if in any special Act passed by the Parliament of Canada previously to February 1, 1904, it is enacted that any provision of the Railway Act, 1888, or other general Railway Act in force at the time of the passing of such special Act, is excepted from incorporation therewith, or if the application of any such provision is, by such special Act, extended, limited, or qualified, the corresponding provision of the general Act is to be taken to be excepted, extended, limited, or qualified, in like manner. By s. 247, when any company is empowered by special Act of the Parliament of Canada to construct, operate, and maintain lines of telegraph or telephone or

for the conveyance of light, heat, power, or electricity, the company may, with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising its powers, and may, subject to certain restrictions, break up the ground. If the company cannot obtain leave from the municipality it may apply to the Board of Railway Commissioners, and the Board has discretion to grant such leave.

Sect. 248 specially defines the word "company," for the purposes of that particular section, to include a telephone company, and imposes restrictions on the powers of such companies to construct, maintain, or operate their lines of telephone upon, along, across, or under any highway, square, or other public place in any city, town, or village, without the consent of the municipality. The materiality of this section, which is to apply notwithstanding any provision of any Act of the Parliament of Canada, is that it shews that where the Legislature intended to interfere with the powers of companies other than railway companies it did so by special provision.

[1912] *A. C.* p. 842.

Sect. 247, in the opinion of their Lordships, applies, so far as the wording of the section itself is concerned, only to companies within the definition clause, that is to railway companies. Railway companies may have powers to construct lines of telegraph or telephone, or for the conveyance of light, heat, power, or electricity. When they have such powers, and no special power to enter on municipal property, the section empowers them to do so, if the municipality consents, and under restrictions. But if by its special Act the railway company has been in terms given larger and less restricted powers of the same kind, ss. 3 and 4 already referred to shew that these special powers are saved. An exception to this appears in sub-s. (*g*) of s. 247, where the Board of Railway Commissioners is given jurisdiction to abrogate rights given by the special Act to the extent of requiring the lines to be placed underground.

As to this sub-section, two observations must be made. The first is that no question of its application is raised in this litigation. The second is that the application of the sub-section is excluded by the wording of s. 21 of the Act of incorporation. It is inconsistent with the provisions of that Act, for it is in reality only one of the provisions of the Railway Act of 1906 relating to railway companies, and is therefore excluded.

The only way in which s. 247 of the Railway Act of 1906 is applicable to the appellants is by the language in which it is

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[1912] *A. C.* *p.* 842.

made applicable by s. 21 of their special Act. But if the provisions of s. 90 of the Railway Act, 1888, as amended by the Railway Act, 1899, and in substance re-enacted with additions by the Railway Acts, 1903 and 1906, are, as appears to be the case, kept alive by the Interpretation Act, these provisions are declared by s. 21 of the special Act applicable only in so far as they are not inconsistent with the provisions of that Act. Moreover, the definitions of "company" and "railway" in s. 21 make ss. 3 and 4 of the Railway Act, 1906, apply, so that the provisions of the appellants' Act of incorporation override and extend the provisions of s. 247. In the result it appears to their Lordships that the powers conferred by ss. 12 and 13 of the Act of incorporation of 1902 remain intact.

In the Courts below the trial judge decided in favour of the appellants on the question of power to enter and erect their poles without consent. A point was discussed as to the deposit of plans under s. 18 which it is now agreed does not arise.

The Court of Appeal took a different view. They held that the general restrictions imposed by s. 90 of the Act of 1888, as amended by the Act of 1899, and by s. 247 of the Act of 1906, were not inconsistent with the provisions of ss. 12 and 13 of the Act of incorporation.

For these reasons their Lordships cannot agree with this opinion. They will therefore humbly advise His Majesty that this appeal should be allowed, and that it should be declared that the appellants are entitled to a declaration that they are at liberty to erect poles for the purpose of stringing transmission or power wires along Eglinton Avenue without the consent of the respondents, and to have the latter restrained from interfering with them in doing so. The respondents must pay the costs of this appeal and in the Courts below.

Solicitors for appellants: *Charles Russell & Co.*
Solicitors for respondents: *Blake & Redden.*

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IN THE MATTER OF A REFERENCE TO THE SUPREME COURT OF CANADA OF CERTAIN QUESTIONS CONCERNING MARRIAGE.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, ss. 91 and 92—Construction—Jurisdiction of the Provincial Legislature—Solemnization of Marriage.

Under ss. 91 and 92 of the British North America Act, 1867, the exclusive power conferred on the provincial Legislature to make laws relating to the solemnization of marriage in the province operates by way of exception to the exclusive jurisdiction as to its validity conferred upon the Dominion, and enables the provincial Legislature to enact conditions as to solemnization, and in particular as to the right to perform the ceremony, which may affect the validity of the contract.

Appeal by special leave from opinions given by the Supreme Court of Canada (June 17, 1912) in answer to three questions submitted by the Governor-General in Council under s. 60 of the Supreme Court Act.

The questions and the answers of the Court thereto are set out in the judgment of their Lordships.

The issue with which they dealt was whether the Dominion Parliament had power to set aside any limitation of authority imposed by a province in regard to the performance of a marriage ceremony and to substitute therefor a general authority which should be applicable to all cases, whatever the religious beliefs of the parties to the marriage or of the person authorized to perform the ceremony.

The Government of the Dominion of Canada appointed counsel to argue both sides of the questions submitted; the Attorney-General for the Province of Quebec also appeared before the Supreme Court and the Judicial Committee; and the Attorney-General for the Province of Ontario appeared before the latter tribunal.

Nesbitt, K.C., and *Geoffrey Lawrence* (*Lafleur*, K.C., with them), in support of the Dominion Parliament's jurisdiction to enact the proposed Bill in whole or in part, and to enact remedial [1912] A. C. p. 881.

* *Present*:—Viscount Haldane, L.C., Earl of Halsbury, Lord Macnaghten, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Chief Baron Palles.

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legislation in manner contemplated by the third question, contended that legislation concerning the contract of marriage, its validity and the capacity of the parties thereto, was by s. 91 of the British North America Act exclusively assigned to the Dominion. They further contended that under s. 92 the provincial Legislatures could only deal with the solemnization of marriage, which on its true construction meant the regulation of the evidentiary or religious formalities by which the contract is to be authenticated or sanctified. They referred to s. 91, sub-s. 26, and s. 92, sub-s. 12, and s. 93, and submitted that the word marriage must be construed in its widest sense as meaning the whole contract of marriage independent of formalities which are separable therefrom: see *Dalrymple* v. *Dalrymple* (1). In that sense solemnization follows on a completed contract declared by the Dominion to be valid, and the jurisdiction assigned to the province was not intended to carry with it the power of impairing or destroying the validity of the contract. The object of the proposed Bill was to prevent the province from doing so. If the Bill were passed the province could still impose formalities and exact penalties from either the parties or the officials or both for failure to comply with them, but it would not be able to make the validity of the marriage dependent on their due performance. The existing Marriage Act (R. S. C., 1906, c. 105) is consistent with this construction, and the proposed Bill to amend it is along the same line. To hold that the Bill was ultra vires of the Dominion would render the power of the Dominion over marriage illusory, contrary to the plain intention of the British North America Act: see *Tennant* v. *Union Bank of Canada* (2). The Dominion Parliament is the only legislative body which has the power to enact remedial legislation validating marriages solemnized in the different provinces of Canada.

Arnoldi, *K.C.*, for the Province of Ontario, said that he was instructed to read the following memorandum:—"While of opinion that it is difficult to give an unqualified yes or no to any one of the questions submitted, and that the law is difficult to determine, the Province of Ontario favors a uniform general law for the Dominion, if so framed that the legislative authority of the province in relation to the solemnization of marriage is not thereby violated, and the Province of Ontario adopts so much of the argument of counsel as is consistent with the view above expressed and no more. The Province of Ontario considers that an Act of Parliament which renders valid throughout the

[1912] *A. C. p.* 882.

(1) [1811] 2 Hagg. Cons. 54, 61. (2) [1891] A. C. 31, 45, 47, *ante*, p. 433.

Dominion marriages performed in a province by persons legally authorized by such province would result in consolidating and perfecting provincial authority throughout Canada, and in this view the passing of such an Act by the Dominion Parliament would enlarge rather than encroach upon provincial jurisdiction."

Hellmuth, K.C. (*Mignault*, K.C., with him), contended that the answers given by the majority of the Court to questions 1 and 3 were correct. There is a broad distinction between marriage and the solemnization of marriage. The Dominion has exclusive power to legislate as to the competence of parties to contract marriage, its obligatory force, the status of the parties to it thereafter, its effect upon the status of the children, and the power of dissolving the tie when entered into. The province has exclusive power of regulating the form of the ceremony. The proposed Bill before the Dominion Parliament assumed to deal therewith and was consequently ultra vires. Reference was made to *Citizens Insurance Co. of Canada* v. *Parsons* (1); *Swifte* v. *Attorney-General for Ireland*. By the Civil Code of the Province of Quebec the marriage of Roman Catholics can be validly solemnized only before a Roman Catholic priest. At a mixed marriage also the presence of a Roman Catholic priest is necessary, and the Dominion has no jurisdiction to interfere therewith by a law regulating the mode of celebration. Reference was made to *Beamish* v. *Beamish* (2); *Brook* v. *Brook* (3).

R. C. Smith, K.C., and *Geoffrion*, K.C., for the Attorney-General for the Province of Quebec, contended that the proposed Bill was ultra vires of the Dominion. The general subject "marriage and divorce" has been assigned to the Dominion. Out of this subject a small division, "solemnization of marriage in the province," has been carved and assigned to the provinces. Solemnization is therefore expressly excepted from the general words "marriage and divorce" and cannot by any true rule of construction be held to be included therein. It would defeat the purpose of the British North America Act if the Dominion legislative authority should be held in this case to overlap the provincial authority. *Hodge* v. *The Queen* (4) was the first case in which a rule was laid down as to a subject falling within both ss. 91 and 92 and does not apply to the circumstances of this case. Reference was made to the existing legislation on the subject of the solemnization of marriage and its formalities,

[1912] *A. C.* p. 883.

(1) (1881) 7 App. Cas. 96, *ante*, p. 267.
(2) (1861) 9 H. L. C. 274, 348.
(3) (1861) 9 H. L. C. 193, 223.
(4) (1883) 9 App. Cas. 117, 130, *ante*, p. 333.

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and it was contended that solemnization in the British North America Act of 1867 must have the same meaning that it had in all previous enactments: see Ordonnance de Blois, Mai, 1579; Édit de Henri IV., Decembre, 1606; Quebec Act 1774 (imperial), 14 Geo. 3, c. 83, s. 8; the Constitutional Act, 31 Geo. 3, c. 31, s. 33 (imperial); and the following Acts of Lower Canada: 44 Geo. 3, c. 2; 1 Geo. 4, c. 19; 7 Geo. 4, c. 2; 23 Vict. c. 11; Consol. Stat., 1861, c. 20, ss. 16, 17, 18; Civil Code of Lower Canada, 1866, arts. 128, 135. Solemnization is not a mere formality, it is an essential part of marriage, and that view of it must have been present to the minds of the framers of the Act of 1867. The Bill is therefore ultra vires the Dominion Parliament: see *Bank of Toronto* v. *Lambe* (1); *City of Fredericton* v. *The Queen* (2); *Citizens Insurance Co.* v. *Parsons* (3); *Attorney-General for Ontario* v. *Hamilton Street Railway* (4); *Attorney-General for Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (5); *City of Montreal* v. *Montreal Street Railway* (6).

Nesbitt, K.C., replied, contending that under the true construction of ss. 91 and 92 solemnization in the latter section cannot be so construed as to cut down the jurisdiction of the Dominion under s. 91 as to the validity of marriage and the status of the contracting parties.

[1912] *A. C. p.* 884.

The judgment of their Lordships was delivered by

1912 *July* 29.

VISCOUNT HALDANE, L.C. The questions to be decided arise on an appeal, for which special leave was given, from the answers returned by the Supreme Court of Canada to certain questions submitted by the Government of Canada pursuant to s. 60 of the Supreme Court Act.

The questions so submitted were the following:—

1. (*a*) Has the Parliament of Canada authority to enact, in whole or in part, Bill No. 3 of the First Session of the Twelfth Parliament of Canada, intituled "An Act to amend the Marriage Act"?

The Bill provides as follows:—

"(1.) The Marriage Act, Chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—

"(3.) Every ceremony or form of marriage heretofore or

(1) (1887) 12 App. Cas. 575, 587, *ante*, p. 378.
(2) (1880) 3 Can. S. C. R. 505, 568.
(3) 7 App. Cas. 96, 100, 108, *ante*, p. 267.
(4) [1903] A. C. 524, *ante*, p. 600.
(5) [1898] A. C. 700, *ante*, p. 542.
(6) *Ante*, p. 711.

hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony."

"(2.) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any Province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever."

(*b*) If the provisions of the said Bill are not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions are within such authority?

2. Does the law of the Province of Quebec render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such Province,

(*a*) between persons who are both Roman Catholics, or

(*b*) between persons one of whom, only, is a Roman Catholic.

[1912] A. C. p. 885.

3. If either (*a*) or (*b*) of the last preceding question is answered in the affirmative, or if both of them are answered in the affirmative, has the Parliament of Canada authority to enact that all such marriages, whether

(*a*) heretofore solemnized, or

(*b*) hereafter to be solemnized,

shall be legal and binding?

The answers of the learned judges of the Supreme Court were in substance to the following effect:—

1. As to the first question the Chief Justice, Davies, J., Duff, J., and Anglin, J., were of opinion that the proposed legislation was ultra vires of the Parliament of Canada. Idington, J., differed.

2. As to the second question all the learned judges concurred in holding that the law of Quebec does not render null and void unless contracted by a Roman Catholic priest a marriage which takes place in that province between persons one of whom only is a Roman Catholic. As to the validity of such marriages between persons who are both Roman Catholics the Chief Justice asked permission to decline to

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answer. Sir Louis Davies, Idington, and Duff, JJ., were of opinion that they were valid, and Anglin, J., held that they were null and void.

3. As to the third question, all the judges except Idington, J., were of opinion that the Parliament has no power to enact such remedial legislation.

The decision of these questions turns on the construction to be placed on ss. 91 and 92 of the British North America Act, 1867. Sect. 91 enacts that the Parliament of the Dominion may make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces, and, for greater certainty, but not so as to restrict the generality of the foregoing terms of the section, declares that, notwithstanding anything in the Act, the exclusive legislative authority of the Parliament of the Dominion extends to all matters coming within the classes of subjects enumerated. One of these is marriage and divorce. The section concludes with a declaration that any matter coming within any of the enumerated classes shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces.

[1912] A. C. p. 886.

Sect. 92 enacts that in each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects enumerated in this section. Among these is the solemnization of marriage in the province. The enumeration also includes, inter alia, property, and civil rights, and generally matters of a merely local or private nature in the province.

In the course of the argument it became apparent that the real controversy between the parties was as to whether all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament by s. 91. If this is so, then the provincial power extends only to the directory regulation of the formalities by which the contract is to be authenticated, and does not extend to any question of validity. This was the view contended for by one set of the learned counsel who argued the case at their Lordships' Bar. The other learned counsel contended that the power conferred by s. 92 to deal with the solemnization of marriage within a province had cut down the effect of the words in s. 91, and

effected a distribution of powers under which the Legislature of the province had the exclusive capacity to determine by whom the marriage ceremony might be performed, and to make the officiation of the proper person a condition of the validity of the marriage.

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If the latter view is taken, it is clear how the questions must be answered. For it was agreed between counsel that the Bill referred to in the first question was intended to enable a person with any authority to perform the ceremony to perform it validly whatever the religious faith of those married by him. On the footing indicated the Bill would therefore be ultra vires of the Dominion Parliament. The third question would also be disposed of, for the Parliament of Canada would, in the events indicated in the question, have no authority. The second question consequently becomes not only unimportant, but superfluous.

[1912] A. C. p. 887.

Notwithstanding the able argument addressed to them, their Lordships have arrived at the conclusion that the jurisdiction of the Dominion Parliament does not, on the true construction of ss. 91 and 92, cover the whole field of validity. They consider that the provision in s. 92 conferring on the provincial Legislature the exclusive power to make laws relating to the solemnization of marriage in the province operates by way of exception to the powers conferred as regards marriage by s. 91, and enables the provincial Legislature to enact conditions as to solemnization which may affect the validity of the contract. There have doubtless been periods, as there have been and are countries, where the validity of the marriage depends on the bare contract of the parties without reference to any solemnity. But there are at least as many instances where the contrary doctrine has prevailed. The common law of England and the law of Quebec before confederation are conspicuous examples, which would naturally have been in the minds of those who inserted the words about solemnization into the statute. Prima facie these words appear to their Lordships to import that the whole of what solemnization ordinarily meant in the systems of law of the provinces of Canada at the time of confederation is intended to come within them, including conditions which affect validity. There is no greater difficulty in putting on the language of the statute this construction than there is in putting on it the alternative construction contended for. Both readings of the provision in s. 92 are in the nature of limitations of the effect of the words in s. 91, and there is, in their Lordships' opinion, no reason why what they consider to be the natural

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construction of the words "solemnization of marriage," having regard to the law existing in Canada when the British North America Act was passed, should not prevail.

This conclusion disposes of the questions raised, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for all parties: *Charles Russell & Co.*

J. C.* 1912 *Dec.* 10, 11, 12. 1913 *Jan.* 31.

ROYAL BANK *v.* THE KING [1913], A. C. 283.

ROYAL BANK OF CANADA AND OTHERS . . DEFENDANTS;

AND

THE KING AND ANOTHER . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Powers of Provincial Legislature—Alberta Act 1 *Geo.* 5, *c.* 9, *held ultra vires—Civil Rights existing and enforceable outside the Province.*

The appellant bank received on deposit at its branch in New York the proceeds in London of a mortgage bond issue by the Alberta Railway Company guaranteed by the Government of Alberta. Under instructions from its head office in Montreal a special railway account in respect thereof in the name of the Treasurer of the province was opened at its Alberta branch (no money being sent there in specie and the account remaining under the control of the said head office) for purposes connected with railway construction wholly within the province as provided by Alberta Acts 16 and 49 of 1909 and subsequent Orders in Council and contracts.

Alberta Act 1 Geo. 5, c. 9, recited that the railway had defaulted in payment of the interest on the bonds and in construction of the line, ratified the guarantee of the bonds, and enacted that the whole of the proceeds of the bonds, including the amount deposited with the appellant bank, should form part of the general revenue fund of the province, free from all claim of the railway company or their assigns, and should be paid over to the Treasurer of the province.

In an action by the Crown and Provincial Treasurer to recover the amount of the deposit held by the appellant bank the latter pleaded that this Act was ultra vires:—

Held, that the bondholders having subscribed their money for a purpose which had failed were entitled to recover their money from the bank at its head office in Montreal, that this was a civil right existing and enforceable outside the province, and that the province could not validly legislate in derogation of that right.

Appeal from a judgment of the Supreme Court (April 13, 1912) affirming a judgment of Stuart, J. (November 4, 1911), and ordering

* *Present:* VISCOUNT HALDANE, L.C., LORD MACNAGHTEN, LORD ATKINSON, and LORD MOULTON.

that the respondents recover from the appellant bank the sum of $6,519,068·96.

The question decided in the appeal was as to the validity of Alberta Act 1 Geo. 5, c. 9, described as "An Act respecting the bonds guaranteed for the Alberta and Great Waterways Railway Company, being an Act to specify certain defaults of the railway and the consequent rights of the province." [1913] *A. C.* *p.* 284.

The said railway company was incorporated by Alberta Act 46 of 1909, and empowered thereby to issue bonds which by Alberta Act 16 of 1909 the provincial Government was empowered to guarantee under arrangements which were duly carried into effect. The proceeds of the bonds which were realized in London were, in accordance with the terms of the construction contract between the railway company and the appellant construction company (which had been incorporated by the Dominion with its head office outside the province), to be paid into certain banks approved by the provincial Government. Thereunder the proceeds were credited to the Provincial Treasurer in a special railway account opened at the Alberta branch of the appellant bank and paid out on instructions received by the branch from the head office, which retained the control. By Order in Council dated November 9, 1909, the sum of $6,000,000 the subject of this suit was directed to be paid into the appellant bank.

On December 16, 1910, the provincial Legislature, under circumstances which are fully detailed in the judgment of their Lordships, passed the Act whose validity is the subject of appeal. After recitals (the truth of which was not admitted) that the railway company had made default in construction and in payment of interest on the bonds, contained provisions to the following effect:—

(*a*) The said guarantee (i.e., the guarantee of the bonds) was ratified and confirmed.

(*b*) The proceeds of the sale of the bonds and interest thereon then standing in certain banks (including $6,000,000 in the appellant bank) were declared to form part of the general revenue fund of the Province of Alberta free and clear of any claim thereon or thereto by the railway company, their successors or assigns, and it was enacted that such deposit together with all accrued interest should to the extent to which it was so held be paid to the Treasurer of the province without any set-off, counter-claim, or other deduction whatsoever.

(*c*) The Province of Alberta should as between itself and the railway company be primarily liable upon the said bonds to the several holders thereof, and the province should indemnify the railway company, its assets and undertaking, from any claim under the said bonds. [1913] *A. C.* *p.* 285.

On the same day that the Act was passed the Provincial Treasurer

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claimed payment from the appellant bank in accordance with the Act, and on refusal an action was brought by the Attorney-General of Alberta on behalf of the Crown and the Provincial Treasurer for the recovery of the amount in deposit with the said bank. The railway and construction companies were afterwards added as defendants on their own application for the purpose of enabling them to resist payment.

They contended that the Act was ultra vires the Alberta Legislature because

(1.) it affected property and civil rights outside the province;

(2.) it was essentially a banking Act within the exclusive legislative authority of the Dominion;

(3.) it was confiscatory and attempted to raise revenue in a manner other than by direct taxation within the province.

Stuart, J., decreed in favour of the plaintiffs that they recover from the bank the full amount claimed with interest. He was of opinion that the statute of 1910 was upon a matter of local concern, the proceeds of the bonds being within the province at the time the statute was passed, which was therefore authorized by enumeration 16 of s. 92 of the British North America Act. He was further of opinion that the statute was not a banking statute, and he observed that it was utterly unreasonable to say that moneys raised on the security of the province and intended by the Legislature to be devoted by the company whose bonds were secured to the construction of a railway in the province could not be diverted by an Act of the Legislature to another purpose because those moneys had for convenience been deposited in a bank on the ground that such an Act would be banking legislation.

[1913] *A. C.* *p.* 286.

The Supreme Court en banc dismissed an appeal from this judgment with costs. Harvey, C.J., was of opinion that the statute was probably authorized by enumerations 10 and 16 of s. 92 of the British North America Act, but certainly fell within enumeration 13 of that section having regard to the decision of His Majesty in Council in *Rex* v. *Lovitt* (1). He also agreed with Stuart, J., that the Act was not banking legislation.

On the question whether the Act was ultra vires because confiscatory, the Chief Justice, after referring to *Reg.* v. *Burah* (2), *Dobie* v. *Temporalities Board* (3), *Hodge* v. *Reg.* (4), *Powell* v. *Apollo Candle Co.* (5), and *Attorney-General for Canada* v. *Attorneys-General for Provinces* (6), held that it was clear that the right to confiscate private property over which the province has jurisdiction belongs to

(1) [1912] A. C. 212.
(2) (1878) 3 App. Cas. 889.
(3) (1882) 7 App. Cas. 136, *ante*, p. 293.
(4) (1883) 9 App. Cas. 117.
(5) (1885) 10 App. Cas. 282.
(6) [1898] A. C. 700, *ante*, p. 543.

the province; and that the function of the Court was to determine the legal and not the moral validity of the Act.

All the defendants appealed.

Sir R. Finlay, K.C., *R. B. Bennet*, K.C., *J. H. Moss*, K.C., and *W. Finlay*, for the appellants, contended that the Act in question was ultra vires the provincial Legislature. Its subject-matter does not fall within any of the classes enumerated in s. 92 of the British North America Act, 1867. Its powers to raise money are by that section limited to direct taxation within the province, borrowing on the sole credit of the province, management and sale of public lands, and the issue of licences. The method adopted in this case was mere confiscation, which was not authorized by the Act of 1867: see the dictum of Lord Watson in *Dobie* v. *Temporalities Board* (1). The Chief Justice, it was submitted, was wrong in saying that the effect of that judgment was weakened by subsequent cases and that it must be limited to the particular circumstances of the *Dobie Case* (2) or to property of companies carrying on business under Dominion authority. It was contended that the power to confiscate was excluded altogether and that the powers of raising revenue granted by s. 92 were exhaustive. Reference was made to *Attorney-General of Ontario* v. *Mercer* (3); *Citizens Insurance Co.* v. *Parsons* (4). The Act, moreover, was ultra vires inasmuch as its provisions were not limited to property and civil rights within the province, but affected the legal rights of many persons outside the province. At the time it was passed the situs of both debtor and creditor in respect of the money deposited was outside the province; and on the evidence neither the profits nor the civil rights which were dealt with by the Act were within the Province of Alberta or the jurisdiction of its Legislature. The creditors in the case were the bondholders and their trustee. The moneys deposited in the approved banks were held in trust for them to remain upon special account till paid out for construction purposes and then to be converted into assets of the railway company covered by the mortgage in favour of the said trustee. In either shape, whether as money deposited or as railway, it was security to the bondholders abroad and could not be taken from them by the provincial Legislature and appropriated to its own purposes. The debtor also was outside the province. The head office of the bank was in Montreal, and the deposit in question being large in amount and unusual in character was always under the control of the Montreal head office, and though the special account

[1913] *A. C.* p. 287.

(1) 7 App. Cas. 136, *ante*, p. 293.

(2) (1882) 7 App. Cas. 136, *ante*, p. 293.

(3) (1883) 8 App. Cas. 767, 774, 775.

(4) (1881) 7 App. Cas. 96, 106, 109, *ante*, p. 267.

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was kept at a local branch within the province, no withdrawals were allowed without authority from the head office, which retained complete control of the fund. The appellant bank was liable to its creditor at its head office, and his claim could be enforced in the Courts either of Quebec or New York. This case was distinguished from that of *Rex* v. *Lovitt* (1) relied upon by the Chief Justice. The head office of the bank in that case knew nothing of the depositor, the deposit receipt was signed by the branch manager, and the depositor dealt exclusively with the branch bank and not with the head office. In this case it was contended that, even if the legislation was competently enacted, it could not have extra-territorial operation or affect any property or civil rights beyond the territorial limits of the province. It did not purport to put an end to the contracts of construction and guarantee. The obligations thereunder are still enforceable and the proceeds of the bonds are held subject thereto. Otherwise the bondholders are entitled to a return of their moneys which they have advanced for a purpose which has failed. The effect of the Act was to convert a special deposit which was conditionally payable to the depositor or to be invested for his benefit into an unconditional deposit payable on demand to a person other than the depositor. Reference was made to *Attorney-General* v. *Alexander* (2); *Prince* v. *Oriental Bank Corporation* (3); *De Beers Consolidated Mines, Ld.* v. *Howe* (4); *McGregor* v. *Esquimalt and Nanaimo Railway* (5); *Woodruff* v. *Attorney-General for Ontario* (6); *Bank of Toronto* v. *Lambe* (7); *Attorney-General for Quebec* v. *Reed* (8); *Tennant* v. *Union Bank of Canada* (9); *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (10); *Madden* v. *Nelson and Fort Sheppard Railway* (11); *Toronto Corporation* v. *Bell Telephone Co. of Canada* (12).

[1913] *A. C. p.* 288.

Buckmaster, K.C., C. A. Masten, K.C., and *Geoffrey Lawrence*, for the respondents, contended that the appellant bank was a debtor to the Province of Alberta as its customer and that c. 9 of the Alberta Statutes for 1910 imposed upon the appellant bank a legal obligation to pay to the respondents the amount in suit. That statute was authorized by s. 92 of the British North America Act, and especially by enumerations 10, 13, and 16, and was one step in a series of enactments relating exclusively to a local work and undertaking within the Province of Alberta. The property and civil rights dealt with by the Act are

(1) [1912] A. C. 212, *ante*, p. 700.
(2) (1874) L. R. 10 Ex. 20.
(3) (1878) 3 App. Cas. 325.
(4) [1906] A. C. 455.
(5) [1907] A. C. 462, *ante*, p. 647.
(6) [1908] A. C. 508, 513, *ante*, p. 662.
(7) (1887) 12 App. Cas. 575, 581, *ante*, p. 378.
(8) (1884) 10 App. Cas. 141, *ante*, p. 360.
(9) [1894] A. C. 31, *ante*, p. 433.
(10) [1907] A. C. 65, *ante*, p. 436.
(11) [1899] A. C. 626, *ante*, p. 571.
(12) [1905] A. C. 52, 56, *ante*, p. 617.

within the province, and the latter are enforceable in the province and according to the law of the province. The expression property and civil rights should receive a wide construction: see *Citizens Insurance Co.* v. *Parsons* (1); *McGregor* v. *Esquimalt and Nanaimo Railway* (2). It was contended that all property, real or personal, and all civil rights within the limits of Alberta are subject to Alberta legislation. The property and civil rights dealt with by the Act in question were [1913] *A. C. p.* 289. property and civil rights within the province, and that was the decisive consideration in the case. The evidence shewed that the deposit was in pursuance of an agreement to that effect made in the appellants' branch bank at Edmonton in the province under the Guarantee Act (16 of 1909), and that it was a condition of the delivery up of the bond in suit that it should be so made. The circumstance that persons outside the province had rights which were affected by the Act in question did not render the legislation invalid. So long as the property affected by the Act is situated within the province it is immaterial that the owner or other persons affected thereby are outside the province. If the property so affected were land situate within the province, legislation regarding it would not be invalid so far as it affected the interests of an owner outside the province, and in that regard no material distinction can be drawn between landed property and the fund in question in this case. The control of the Legislature over the fund is as complete as it would have been over land.

Sir R. Finlay, K.C., in reply.

The judgment of their Lordships was delivered by

1913 *Jan.* 31.

VISCOUNT HALDANE, L.C. This is an appeal from a judgment of the Supreme Court of Alberta. It raises questions of much importance, which their Lordships have taken time to consider. The main controversy is as to the validity of a statute of the Legislature of Alberta passed in 1910, and dealing with the proceeds of sale of certain bonds. These proceeds had been deposited with certain banks, one of them being the appellant bank. The judgment under appeal was given in an action brought by the Government of Alberta against the Royal Bank of Canada, the Alberta and Great Waterways Railway Company, and the Canada West Construction Company, to recover $6,042,083·26, with interest, being the amount of the deposit held by the appellant bank. The Court of first instance and the Court of Appeal of the province have given judgment for the Government.

It is contended by the appellants that the statute in question

(1) 7 App. Cas. 96, *ante*, p. 267. (2) [1907] A. C. 462, *ante*, p. 647.

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was not validly enacted. It is said to have been ultra vires of the Legislature of the province as attempting to interfere with property and civil rights outside the province, and also as trenching on the field of legislation as to banking, which, by s. 91 of the British North America Act, is reserved to the Parliament of Canada. It is further said that inasmuch as the statute purported to make the deposits part of the general revenue fund of the province, it was inoperative as being an attempt to raise revenue for provincial purposes in a manner not authorized by s. 92 of that Act. In order to determine the points thus raised, it is necessary to examine the transactions to which the legislative action of the Alberta Government was directed.

[1913] *A. C.* *p.* 290.

The appellant railway company was incorporated by an Act of the Legislature of the province, being c. 46 of 1909, for the purpose of constructing and operating a railway to extend from Edmonton in a north-easterly direction, and to be wholly within the province. The capital was to be $7,000,000, and the company was empowered to issue bonds. By another Act of the same session, being c. 16, which received the Royal Assent on the same day, February 25, the Government of Alberta was authorized to guarantee the principal and interest of the bonds to be issued by the railway company to the extent of $20,000 a mile up to 350 miles, with a further amount in respect of the cost of terminals. The bonds were to be repayable in fifty years, and were to bear interest at the rate of 5 per cent. By s. 2 it was provided that the bonds so guaranteed were to be secured by mortgage to be made to trustees, which was to cover the railway, its rolling stock and equipment, and its revenues, rights, and powers. By s. 3 the form and terms of the bonds, mortgage, and guarantees were to be approved by the Lieutenant-Governor in Council. By s. 4, when the guarantees were signed on behalf of the Government, the province was to be liable for payment of principal and interest, and no person entitled to the bonds was to be under the necessity of inquiry in respect of compliance with the terms of the Act. By s. 5 all moneys realized by sale, pledge, or otherwise of the bonds were to be paid by the purchaser, subscriber, pledgee, or lender into a bank or banks approved by the Lieutenant-Governor in Council, to the credit of a special account in the name of the Treasurer of the province, or such other credit as the Lieutenant-Governor in Council should direct. The balance at the credit of the special account or accounts was to be credited with interest at such times and at such rate as might be agreed on between the company and the bank holding the same, and such balance was from time to time to be paid out

[1913] *A. C.* *p.* 291.

to the company or its nominee, in monthly payments so far as practicable, as the construction of the lines of railway and the terminals was proceeded with to the satisfaction of the Lieutenant-Governor in Council according to specifications to be fixed by contract between the Government and the company and in such sums as an engineer appointed by the Lieutenant-Governor in Council should certify as justified, provided that at the option of the company the moneys so paid into the bank should, instead of being so paid out, be paid to the company on the completion, as certified by the engineer to the satisfaction of the Lieutenant Governor in Council, of sections and terminals specified. The balance of the proceeds of the bonds which might remain after completion of the railway was to be paid over to the company or its nominee. Sect. 5 concluded with a provision, which appears to have been inaccurately printed, but which their Lordships interpret as bearing the meaning put on it in an Order in Council subsequently made by the Lieutenant-Governor on October 7, 1909, that the balance at the credit of the special account remaining until paid out as above arranged for was to be deemed part of the mortgaged premises under the mortgage, and not public moneys received by the province.

On October 7 two Orders in Council were made by the Lieutenant-Governor. The first of these, after reciting the Incorporating Act and the Guarantee Act above referred to, approved forms of mortgage and a guarantee, authorized the proper officials to execute them, and designated the Standard Trusts Company as the trustee under the mortgage deed. This Order also, pending the preparation of engraved bonds, authorized the guarantee of a single printed bond without coupons for the entire sum to be covered by the bonds, $7,400,000, to be exchanged for the engraved bonds in due course. By the second of these Orders, after reciting that the company had elected to receive the money on completion of sections and of terminals on a progress basis, certain banks, including the appellant bank, were designated as the banks into which the proceeds of the bonds were to be paid in accordance with the Guarantee Act. By an Order made on November 9 the list of banks was varied, but the appellant bank remained included, and the deposit out of the proceeds of the bonds of $6,000,000, being the principal included in the amount sued for, was assigned to it. This Order recited that it was the understanding of the Government that on the proper interpretation of the last-mentioned Act the moneys in question, when paid into the banks, not being public moneys received by the province, could only be withdrawn on the terms stated in the Act. The

[1913] A. C. p. 292.

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second Order of October 7 had approved the terms of the preliminary bond in a form which made the principal and interest payable in London at the counting-house of Messrs. Morgan, Grenfell & Co. The terms of the bond provided that it should be secured by a mortgage from the railway company to the Standard Trusts Company and for the guarantee of principal and interest by the province. The bond was to be registered in the books of the company in London, and transfers were to be made in these books.

Shortly after the making of the two Orders in Council of October 7 arrangements were made in London with Messrs. Morgan, Grenfell & Co. for the raising of the money authorized to be borrowed. To enable the transaction to be carried out, the railway company on October 28 entered into a formal contract with the provincial Government for the construction of at least 350 miles of the line. The contract recited the right of the company to issue bonds in proportion to mileage and terminals and the authority of the Government to guarantee principal and interest to the extent of $20,000 a mile and further sums in respect of terminals, and provided, in accordance with the Guarantee Act, that the proceeds arising from the bonds so issued should be paid into the banks approved by the Lieutenant-Governor in Council to the credit of the Treasurer of the province in a special account, and that such proceeds should from time to time be paid out to the railway company on engineers' certificates. The balance of the proceeds after completion of the railway and terminals was to be paid over to the railway company.

[1913] A. C. p. 293.

By a deed of the same date made between the railway company, the provincial Government, and the Standard Trusts Company, a company incorporated under the law of Manitoba, and having its head office outside the province, the railway company mortgaged its property to the Trusts Company to secure the bonds for the sum of $7,400,000, and interest at 5 per cent., repayable on January 1, 1959, and the Government guaranteed payment of principal and interest. The security expressly included not only the railway and its rolling stock and equipment, but all real and personal property then or thereafter held or acquired for the purposes of the railway. Later on, on November 22, the railway company entered into a contract with the appellant construction company, which had been incorporated under Dominion statutes and had its head office outside the province, for the construction of the railway, and the railway company agreed to pay to the construction company the net proceeds of the bond issue, an agreement which was afterwards supplemented by a formal assignment of March 8, 1910.

Under the arrangements with Messrs. Morgan, Grenfell & Co., the preliminary bond for $7,400,000 already referred to was taken up by them. A letter of October 11, 1909, from the Deputy Provincial Treasurer of the province to Messrs. J. P. Morgan & Co., of New York, shews the method adopted by the Government in carrying out the transaction. The preliminary bond was to be handed to Messrs. J. P. Morgan & Co. as agents for the Government. That firm was to transfer to or hold this bond for Messrs. Morgan, Grenfell & Co., the immediate takers up of the bond issue in London. The purchase-money was to be deposited to the credit of the Provincial Treasurer in the Edmonton branches of the designated banks. These arrangements were carried out in this fashion. As the proceeds of the bond issue in London came over to New York the money which was to be applied and secured, in accordance with the statutes, Orders in Council, and contracts already referred to, was paid in instalments in New York, the part with which the appellant bank is concerned being received by its house in New York, and credited to the Provincial Treasurer to the railway special account. The bank had its head offices in Montreal and was incorporated under Dominion law. The account at Edmonton in Alberta was opened there in accordance with the arrangements already referred to. No money in specie was sent to the branch office which the bank possessed there, but the general manager in Montreal arranged for the proper credit of the special account. It is plain that all these transactions were carried out for the purposes and on the faith of the statutes, Orders in Council, contracts, and mortgage deed referred to, and were effected for the purpose of providing for the construction of the railway with the security and guarantees which had been given. It is not in dispute that the Government at this period meant the appellants to understand that it would adhere strictly to the terms of its guarantee.

[1913] A. C. p. 294.

The construction company commenced the works preliminary to the construction of the line. No part of the sum at the credit of the special account was paid out for this purpose, but the bank made advances, and the construction company assigned to the bank as security its interest in the proceeds of the bond issue.

The second chapter of the history of the events which resulted in the appeal before their Lordships opened in March, 1910. There appears to have been public uneasiness about the action of the Government in entering into the arrangements above described, and, in the event, a Royal Commission of inquiry was appointed. While it was sitting there was a change of Government. The new Administration introduced and passed two statutes, and on the validity of the

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[1913] A. C. p. 295.

first of these the question to be decided in the appeal turns. This statute, which became law on December 16, 1910, after setting out in its preamble that the railway company had made default in payment of interest on the bonds and in the construction of the line, and then ratifying and confirming the guarantee by the province of the bonds, enacted that the whole of the proceeds of sale of the bonds, and all interest thereon, including such part of the proceeds of sale as was then standing in the banks in the name of the Treasurer of the province or otherwise, and comprising, inter alia, the $6,000,000 and accrued interest in the appellant bank, should form part of the general revenue fund of the province free from all claim of the railway company or their assigns, and should be paid over to the Treasurer without deduction. It was also provided that notwithstanding the form of the bonds and guarantee the province should as between itself and the railway company be primarily liable on the bonds and should indemnify the company against claims under them. By another statute passed at the same time any person or corporation claiming to have suffered loss or damage in consequence of the passing of the Act just referred to might submit a claim to the Government to be reported on to the Legislature.

On the day of the passing of these Acts a notice was served on behalf of the Treasurer of the province on the appellant bank claiming payment of $6,042,830·26 and interest, and a cheque was presented to and refused by the bank. A claim against the bank as from this date for interest at the rate of 5 per cent. was then made. The action out of which the appeal arises was immediately launched, claiming, on behalf of the Crown and the Provincial Treasurer, the sum above mentioned from the appellant bank, and the railway company and the construction company were subsequently joined as defendants. The main defence pleaded was the invalidity of the first of the two statutes of 1910, and the bank also claimed a lien for advances to the construction company. The case was tried before Stuart, J., who held that the proceeds of the bonds were within the province, and that the matter was one of a local nature in the province. He therefore decided that it fell within class 16 of s. 92 of the British North America Act, and not within s. 91, and that accordingly, the statute having been validly passed, there should be judgment for the plaintiffs. The appellants appealed to the Court of Appeal, which unanimously dismissed the appeal. The Chief Justice held that the statute was probably authorized by classes 10 and 16 of s. 92, and certainly by class 13, relating to property and civil rights. He also decided against the appellants on the further

points they made that the Act trenched on the subject of banking legislation in s. 91, and that it was invalid as being confiscatory and not an authorized way of raising a provincial revenue. Beck, J., Scott, J., and Simmons, J., decided against the appeal on substantially the same grounds, though the two latter learned judges differed from the rest of the Court on a minor question as to interest.

Their Lordships are not concerned with the merits of the political controversy which gave rise to the statute the validity of which is impeached. What they have to decide is the question whether it was within the power of the Legislature of the province to pass the Act of 1910. They agree with the contention of the respondents that in a case such as this it was in the power of that Legislature subsequently to repeal any Act which it had passed. If this were the only question which arose the appeal could be disposed of without difficulty. But the Act under consideration does more than modify existing legislation. It purports to appropriate to the province the balance standing at the special accounts in the banks, and so to change its position under the scheme to carry out which the bondholders had subscribed their money. Elaborately as the case was argued in the judgments of the learned judges in the Courts below, their Lordships are not satisfied that what appears to them to be the fundamental question at issue has been adequately considered.

[1913] A. C. p. 296.

It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration that has failed. It applies, as was pointed out by Brett, L.J., in *Wilson* v. *Church* (1), when money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect subsequently to the payment and which has become abortive. The lender has in this case a right to claim the return of the money in the hands of the borrowers as being held to his use. *Wilson* v. *Church* (1), which was affirmed in the House of Lords under the name of *National Bolivian Navigation Co.* v. *Wilson* (2), is an excellent illustration of the principle. A loan had been raised to make a foreign railway, on a prospectus which set out a concession by the foreign Government in virtue of which the bondholders were to have the benefit of certain Customs duties. The foreign Government, finding that the railway had not been made, revoked the concession. The trustees, to whom the

[1913] A. C. p. 297.

(1) (1879) 13 Ch. D. 1, at p. 49. (2) (1880) 5 App. Cas. 176.

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money had been paid to be expended on the gradual construction of the railway, contended that it was not apparent that they could not with certain variations substantially carry out the scheme. It was held that while the Government had a right to revoke the concession, which could not be questioned, the effect of its so doing was materially to vary the prospects and terms of security of the bondholders, and that the question whether the scheme had become so abortive that the consideration for the advances had failed must be determined, not merely by a survey of physical or financial considerations, but by reference to the conditions originally stipulated for. The bondholders were declared to be entitled to recover their money.

The present case appears to their Lordships to fall within the broad principle on which the judgments in that case proceeded. The lenders in London remitted their money to New York to be applied in carrying out the particular scheme which was established by the statutes of 1909 and the Orders in Council, and by the contracts and mortgage of that year. The money claimed in the action was paid to the appellant bank as one of those designated to act in carrying out the scheme. The bank received the money at its branch in New York, and its general manager then gave instructions from the head office in Montreal to the manager of one of its local branches, that at Edmonton in the Province of Alberta, for the opening of the credit for the special account. The local manager was told that he was to act on instructions from the head office, which retained control. It appears to their Lordships that the special account was opened solely for the purposes of the scheme, and that when the action of the Government in 1910 altered its conditions, the lenders in London were entitled to claim from the bank at its head office in Montreal the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province, and the Legislature of the province could not legislate validly in derogation of that right. These circumstances distinguish the case from that of *Rex* v. *Lovitt* (1), where the point decided was in reality quite a different one.

[1913] *A. C.* *p.* 298.

In the opinion of their Lordships the effect of the statute of 1910, if validly enacted, would have been to preclude the bank from fulfilling its legal obligation to return their money to the bondholders, whose right to this return was a civil right which had arisen, and remained enforceable outside the province. The statute was on this ground beyond the powers of the Legislature of Alberta, inasmuch as what was sought to be enacted was neither confined

(1) [1912] A. C. 212, *ante*, p. 710.

to property and civil rights within the province nor directed solely to matters of merely local or private nature within it.

Other questions have, as already stated, been raised in this appeal as to whether the statute of 1910 infringed the provisions of s. 91 of the British North America Act, by attempting to deal with a question relating to banking, and by trenching on the field already occupied by the Dominion Banking Act. It was also contended that the appropriation of the deposits to the general revenue fund of the province was outside the powers assigned to the provincial Legislature for raising a revenue for provincial purposes. The conclusion already arrived at makes it unnecessary for their Lordships to enter on the consideration of these questions and of other points which were made during the arguments of counsel.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the action dismissed. The respondents must pay the costs here and in the Courts below.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

BRITISH COLUMBIA *v.* CANADA (FISHING RIGHTS) [1914], A. C. 153.

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July 3, 7, 8, 9, 10, 11; *Dec.* 2.

ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA . . . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENT.

ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO AND OTHERS . . . . } INTERVENANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Legislative Authority of Province—Power to grant Fishing Rights—Railway Belt—Tidal Waters—Navigable Non-tidal Waters—Territorial Waters—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92, 109.

In pursuance of the Terms of Union under which British Columbia was admitted into the Union of Provinces constituted by the British North America Act, 1867, the Legislature of that Province by two statutes granted to the Government of the Dominion a strip of public land extending to twenty miles on each side of the railway to be constructed under those terms. This strip of land is known as the railway belt. By the British North America Act, 1867, s. 91, the legislative authority of the Parliament of Canada extends to "(12.) sea coast and inland fisheries," and by s. 92 the Provincial Legislature may exclusively make

* *Present:*—VISCOUNT HALDANE, L.C., LORD ATKINSON, and LORD MOULTON.

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laws in relation to "(13.) property and civil rights in the Province." In answer to questions submitted to the Supreme Court under the Supreme Court Act (R. S. C., 1906, c. 139), s. 60:—

Held: (1.) It is not competent to the Legislature of British Columbia to authorize the Government of that Province to grant the exclusive right of fishing in either the tidal or the navigable non-tidal waters within the railway belt; so far as those waters are tidal the right of fishing in them is a public right subject only to regulation by the Dominion Parliament; so far as they are not tidal, whether navigable or not, they are matters of private property and under the grant became vested in the Crown in the right of the Dominion. (2.) It is not competent to the Legislature of British Columbia to authorize the Government of that Province to grant the exclusive right of fishing in the sea, including arms of the sea and estuaries of rivers; the right of fishing in the sea is a public right, not dependent upon any proprietary right, and the Dominion has the exclusive right of legislating with regard to it. (3.) The right of the public to fish in the sea does not depend upon any title in the Crown to the subjacent lands. The question whether the shore below low water mark to within three miles of the coast forms part of the territory of the Crown, or is merely subject to special powers for protective and police purposes, is not one which belongs to municipal law alone, and it is not at present desirable that any municipal tribunal should pronounce upon it.

[1914] *A. C.* *p.* 154.

Appeal by special leave from a judgment of the Supreme Court (February 18, 1913) answering questions referred for hearing and consideration.

Under an order made by the Governor-General in Council on June 29, 1910, the following questions were referred to the Supreme Court for hearing and consideration in pursuance of the Supreme Court Act (R. S. C., 1906, c. 139), s. 60:—

1. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right to fish in any or what part or parts of the waters within the railway belt—(*a*) as to such waters as are tidal, and (*b*) as to such waters as, although not tidal, are in fact navigable?

2. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right, or any right, to fish below low water mark in or in any or what part or parts of the open sea within a marine league of the coast of the Province?

3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia and the gulfs, bays, channels, arms of the sea and estuaries of the rivers within the Province, or lying between the Province and the United States of America, so far as concerns the authority of the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right,

or any right, to fish below low water mark in the said waters or any of them?

The material facts were as follows. By an Ordinance promulgated by the Governor of the Colony of British Columbia on November 19, 1858, in which year the Colony was established, the laws of England, criminal and civil, as they existed on that date were declared to be in force in the Colony "so far as the same are not from local circumstances inapplicable." By an Ordinance in 1867 the Ordinance of 1858 was made applicable to the whole of the new Colony of British Columbia, including Vancouver, thereby constituted.

[1914] *A. C.* *p.* 155.

On May 16, 1871, the Colony of British Columbia was admitted into the Union of Provinces in pursuance of the British North America Act, 1867, s. 146. The Terms of Union under which this admission took place are annexed to the Order in Council of May 16, 1871, by which the admission was effected. By art. 5 of those terms it was agreed that the Dominion of Canada should assume and defray the charges for (inter alia) "the protection and encouragement of fisheries." By art. 11 the Government of the Dominion undertook to secure the completion of a railway to connect the seaboard of British Columbia with the railway system of Canada, and the Government of British Columbia agreed to convey to the Government of the Dominion, in trust, to be appropriated in such manner as the latter might deem advisable in furtherance of the construction of the railway, a belt of public lands along the line of railway throughout its entire length in British Columbia, not to exceed twenty miles on each side of the line.

In pursuance of art. 11 the Government of British Columbia by an Act of the Legislative Assembly, 43 Vict. c. 11, amended by 47 Vict. c. 14, granted to the Dominion Government a strip of public lands now known as and referred to in the above questions as the railway belt.

The British North America Act, 1867, by s. 91 provides that the exclusive authority of the Parliament of Canada shall extend, amongst other matters, to the following:—(1.) Public debt and property; (10.) navigation and shipping; (12.) sea coast and inland fisheries; and by s. 92 that Act assigns to the Provincial Legislature exclusive legislative authority over, among other matters, (13.) property and civil rights in the Province.

The reference was heard by the Supreme Court on November 26 and 27, 1912. Pursuant to orders of that Court the Attorneys-General for the Provinces of British Columbia, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Prince Edward Island, and Alberta were notified of the hearing and were given liberty to appear, and, with the exception of the last two named,

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all the above named were represented at the hearing. The Attorneys-General for Ontario, Quebec, New Brunswick, and Manitoba were interveners in the present appeal.

On February 18, 1913, the Supreme Court pronounced its opinion upon the questions submitted as follows:—

"Treating the questions as relating only to rights of fishing as commonly understood this Court was of the opinion as follows:—

"As to the first question submitted, to answer the same in the negative.

"As to the second question, to answer the same in the negative in so far as it relates to the exclusive right to fish in the waters therein mentioned, but to refrain from answering the said question in so far as it relates to any right other than exclusive to fish in the waters therein mentioned.

"As to the third question, to answer the same in the negative in so far as it relates to the exclusive right to fish in the waters therein mentioned, but to refrain from answering the said question in so far as it relates to any right other than exclusive to fish in the waters therein mentioned."

Duff, J., with whose judgment the Chief Justice together with Davies and Brodeur, JJ., agreed, was of opinion that questions 2 and 3 should be answered in the negative in so far as they referred to the grant of exclusive rights of fishing in tidal waters, on the ground that by the law of England the right of fishing in tidal waters is prima facie in the public; that this presumption was not inapplicable to the conditions in British Columbia and was therefore the law of British Columbia when the Province entered the confederation; that under the British North America Act, 1867, s. 91 (12.), these public rights could only be limited or controlled by the Dominion Parliament. With regard to question 1 the learned judge was of opinion that, in so far as it referred to non-tidal waters, it should be answered in the negative, on the ground that the ownership of the beds of navigable non-tidal waters within the railway belt passed as an ordinary profit of the soil unless at the date of the Union the title of the Crown was burdened with a public right of fishing which was only capable of being restricted or limited through the exercise of legislative authority, and that if such a public right did exist the Parliament of Canada alone had legislative authority to limit or restrict it. The learned judge further said that no suggestion had been made in the argument as to the character of any possible non-exclusive right, that he did not understand what point was intended to be raised by the reference to such a possible right in question 2, and that he treated that question as confined to exclusive rights.

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Idington, J., and Anglin, J., each delivered judgments substantially to the same effect.

Sir R. Finlay, K.C., *Lafleur, K.C.*, and *Geoffrey Lawrence*, for the appellant. The beds of all tidal waters, including estuaries of rivers and arms of the sea, vest in the Crown jure prerogativæ. But for Magna Charta, the Crown could by its prerogative right grant the exclusive right of fishing therein to a private individual either together with or distinct from the soil: *Malcolmson* v. *O'Dea* (1); *Murphy* v. *Ryan* (2); *Mayor of Carlisle* v. *Graham* (3); *Neill* v. *Duke of Devonshire* (4); passages from Hale's De Jure Maris (5), cited in the last-named case; *Lord Advocate* v. *Wemyss* (6); *Parker* v. *Lord Advocate* (7); *Fitzhardinge* v. *Purcell* (8). After the establishment of the Colony of British Columbia in 1858 the beds of all tidal waters within the Colony and the fishing rights therein were vested in the Crown in the right of British Columbia. The right of fishing whether belonging to private individuals in non-tidal waters or to the Crown in tidal waters is a right of property: *Murphy* v. *Ryan* (2); this right of property was not affected by the British North America Act, 1867. Lord Herschell in delivering the opinion of the Board in *Attorney-General for the Dominion* v. *Attorneys-General for the Provinces* (9) points out the distinction between proprietary rights and legislative authority and says: "whatever proprietary rights were at the time of that Act possessed by the Provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada." Though the right to grant an exclusive right to fish in tidal waters cannot since Magna Charta be exercised by the Crown, the right still exists and can be exercised by the Legislature, and in British Columbia it can be exercised by the local Legislature, since within the area and subjects prescribed by the British North America Act, 1867, the Province has the same legislative authority as the Imperial Parliament: *Hodge* v. *Reg.* (10); *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (11); *Attorney-General for Ontario* v. *Attorney-General for Canada* (12). Neither did the grant of the railway belt affect a transfer to the Dominion of the fishing rights in tidal waters which were vested in the Crown. Although the right of fishing is not of

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(1) (1863) 10 H. L. C. 593.
(2) (1868) I. R. 2 C. L. 143.
(3) (1869) L. R. 4 Ex. 361.
(4) (1882) 8 App. Cas. 135; (1876) L. R. Ir. 2 C. L. 132.
(5) 1 Harg. Law Tracts, p. 11.
(6) [1900] A. C. 48.
(7) [1904] A. C. 364.
(8) [1908] 2 Ch. 139.
(9) [1898] A. C. 700, *ante*, p. 542.
(10) (1883) 9 App. Cas. 117, *ante*, p. 333.
(11) [1892] A. C. 437, *ante*, p. 414.
(12) [1912] A. C. 571, *ante*, p. 723.

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precisely the same character as the prerogative right to minerals which it was held in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1) did not pass with the railway belt, the effect of that decision is in the appellant's favour. Lord Watson expressly states that the conveyance only contemplated a transfer to the Dominion of the provincial rights to manage and settle the lands and that it was not intended that the proprietary rights in the lands should be taken out of the Province. In *Burrard Power Co.* v. *Rex* (2) the Board was not dealing with fishing rights and the decision is distinguishable. The judgment affirms the view expressed by Lord Watson as to the object of the conveyance of the railway belt. Under the British North America Act, 1867, s. 92, enumeration 13, the Legislature of British Columbia has exclusive legislative authority to make laws in relation to "property and civil rights in the Province"; this authority includes the power to grant an exclusive right of fishing in tidal waters. The legislative authority of the Dominion under s. 91, enumeration 12, namely as to "sea coast and inland fisheries," is confined to regulating the manner in which such rights may be exercised: *In re Provincial Fisheries* (3); the same case on appeal, *Attorney-General for Canada* v. *Attorneys-General for the Provinces* (4). [The following cases also were referred to as to the legislative authority of the Dominion and of the Provinces: *City of Montreal* v. *Montreal Street Railway* (5); *Dobie* v. *Temporalities Board* (6).

[1914] *A. C. p.* 159.

In British Columbia non-tidal navigable waters should be treated as in the same position as tidal waters as regards fishing rights. The civil laws of England as they existed in 1858 were declared to be in force in British Columbia, but only so far as they were not from local circumstances inapplicable. The law of England relating to non-tidal waters is inapplicable to the lakes and great waterways of Canada. Where a river or lake in British Columbia is navigable in fact, although not tidal, the bed and the right of fishing, subject to the right of the public, vest in the Crown. On this point reference was made to the judgment of Anglin, J., in *Keewatin Power Co.* v. *Town of Kenora* (7), the judgment of Strong, C.J., in *In re Provincial Fisheries* (8), and, upon the question of prescriptive rights of the public, to the judgment of Lord Blackburn in *Caldwell* v. *McLaren* (9);

(1) (1889) 14 App. Cas. 295, *ante*, p. 403.
(2) [1911] A. C. 87, *ante*, p. 685.
(3) (1896) 26 Can. S. C. R. 444, at p. 531.
(4) [1898] A. C. 700, *ante*, p. 542.
(5) [1912] A. C. 333, *ante*, p. 711.
(6) (1882) 7 App. Cas. 136, *ante*, p. 293.
(7) (1906) 13 Ont. L. R. 237; subsequently reversed (1908) 16 Ont. L. R. 184.
(8) 26 Can. S. C. R. 444, at pp. 520, 531.
(9) (1884) 9 App. Cas. 392.

Goodman v. *Mayor of Saltash* (1); *Murphy* v. *Ryan* (2); Hale's De Jure Maris (1 Harg. Law Tracts, at p. 18); Angell on Watercourses, 7th ed., § 549, p. 712.

[Their Lordships intimated that they did not propose to deal with the question as to whether the property in the soil of the sea under territorial waters vests in the Crown, but reference was made to *Reg.* v. *Keyn* (3), *Carr* v. *Fracis Times & Co.* (4), and the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73).]

Sir R. Finlay, K.C., and *Lafleur, K.C.*, also appeared, *Geoffrion, K.C.*, being with them, for the intervenants, who adopted the contentions of the appellant.

Newcombe, K.C., *Bateson, K.C.*, *Stuart Moore*, and *Raymond Asquith*, for the respondent. The effect of the decision in *Burrard Power Co.* v. *Rex* (5) is conclusive that the grant of the railway belt carried with it every right and interest of the Province in the lands, conveyed including the water rights. As to non-tidal waters, whether navigable or not, the right of fishing passed to the Dominion as an incident of the land conveyed. It is clear that by the law of England the right of fishing in non-tidal waters vests in the owner of the soil whether the waters are navigable or not, and the public cannot by prescription or otherwise obtain a right of fishing in them: *Pearce* v. *Scotcher* (6); *Smith* v. *Andrews* (7); *Blount* v. *Layard* (8); *Murphy* v. *Ryan* (9); *Johnston* v. *O'Neill* (10). See also the judgment of the Special Commissioners of English Fisheries set out in *Leconfield* v. *Lonsdale* (11). There is no valid reason why in British Columbia the law as to tidal waters should be extended to navigable non-tidal waters. Lord Macnaghten in *Johnston* v. *O'Neill* (12) points out that no distinction for this purpose can be drawn between a large lake and a small one.

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As to the tidal waters (including arms of the sea and estuaries of rivers) the rule laid down in *Malcolmson* v. *O'Dea* (13) applies, and the soil vests in the Crown, but the right of fishing vests in the public. If the Province retained any proprietary right in the soil, that right was, under s. 109 of the British North America Act, 1867, "subject to any trusts existing in respect thereof." The public right of fishing in tidal waters is in the nature of a trust vested in the

(1) (1882) 7 App. Cas. 633.
(2) I. R. 2 C. L. 143, at p. 154.
(3) (1876) 2 Ex. D. 63.
(4) [1902] A. C. 176, at p. 181.
(5) [1911] A. C. 87, *ante*, p. 685.
(6) (1882) 9 Q. B. D. 162.
(7) [1891] 2 Ch. 678.
(8) [1891] 2 Ch. 681, n.
(9) I. R. 2 C. L. 143.
(10) [1911] A. C. 552.
(11) (1870) L. R. 5 C. P. 657, at p. 665.
(12) [1911] A. C. 552, at p. 578.
(13) 10 H. L. C. 593.

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Crown: *Murphy* v. *Ryan* (1); Chitty on the Prerogatives of the Crown, pp. 142, 143; Gould on Waters, 2nd ed., ch. 1, s. 20, p. 41. The effect of s. 109 was considered in *Attorney-General for Canada* v. *Attorney-General for Ontario* (2) and in *St. Catherine's Milling and Lumber Co.* v. *Reg.* (3); those decisions shew that "trust" in s. 109 is not confined to such trusts as a Court of Equity would administer, but is used in a wider sense. The public right of fishing in tidal waters, as also in the sea, is a matter exclusively within the legislative authority of the Dominion Parliament under the British North America Act, 1867, s. 91; it falls within enumeration 12, "sea coast and inland fisheries"; also within enumeration 1, "public debt and property." The word "fisheries" in enumeration 12 is used in the sense of rights of fishing as appears from clause 5 of the Terms of Union, under which the Dominion agreed to assume and defray the charges of (inter alia) "protection and encouragement of fisheries." The regulation of "sea coast and inland fisheries" coming expressly within the legislative authority of the Dominion under s. 91, it is provided by the final words of the section that this authority is not to be cut down by reason of matters of a "local or private" nature included in s. 92: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (4); *Attorney-General for Canada* v. *Attorneys-General for the Provinces* (5). Further, the legislative authority given to the Provinces under s. 92 is only in relation to existing rights and property and does not include the creation of a new right. The right of fishing in tidal waters and in the sea being a right of the public generally is not "property"; if it is, then the Dominion under s. 91 have the exclusive authority to regulate it, including authority to grant the right to individuals.

Sir R. Finlay, K.C., in reply, referred to s. 117 of the British North America Act, 1867, which provides that the several Provinces shall retain all their public property not otherwise disposed of in that Act.

The judgment of their Lordships was delivered by

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VISCOUNT HALDANE, L.C. This is the appeal of the Government of British Columbia from answers given by the Supreme Court of Canada to certain questions submitted to it by the Canadian Government, under the authority of a statute of the Dominion Parliament. The questions did not arise in any litigation, but were questions

(1) I. R. 2 C. L. 143, at p. 149.
(2) [1897] A. C. 199, *ante*, p. 517.
(3) (1888) 14 App. Cas. 46, *ante*, p. 390.
(4) [1896] A. C. 348, *ante*, p. 481.
(5) [1898] A. C. 700, *ante*, p. 542.

of a general and abstract character relating to the fishery rights of the Province.

It is clear that questions of this kind can be competently put to the Supreme Court where, as in this case, statutory authority to pronounce upon them has been given to that Court by the Dominion Parliament. The practice is now well established, and its validity was affirmed by this Board in the recent case of *Attorney-General of Ontario* v. *Attorney-General of the Dominion* (1). It is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of litigants in actual controversies. But this refusal is based on the position of that Court in the Constitution of the United States, a position which is different from that of any Canadian Court, or of the Judicial Committee under the statute of William IV. The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them, and have found it advisable to limit and guard their replies. It will be seen that this is so to some extent in the present appeal.

[1914] *A. C.* *p.* 162.

The questions submitted to the Supreme Court of Canada were as follows:—

1. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise, the exclusive right to fish in any or what part or parts of the waters within the railway belt—(*a*) as to such waters as are tidal; and (*b*) as to such waters as, although not tidal, are in fact navigable?

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2. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise, the exclusive right, or any right, to fish below

(1) [1912] A. C. 571, *ante*, p. 739.

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low water mark in or in any or what part or parts of the open sea within a marine league of the coast of the Province?

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3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia and the gulfs, bays, channels, arms of the sea, and estuaries of the rivers within the Province or lying between the Province and the United States of America, so far as concerns the authority of the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise, the exclusive right or any right to fish below low water mark in the said waters or any of them?

Before dealing with these questions it is necessary to refer to the nature and origin of the Constitution of the Province of British Columbia. The Province was established by an Imperial statute passed in 1858, and by various Orders in Council made under its provisions a Government was set up consisting of a Governor and a local Legislature. By certain of these Orders, and by a local Ordinance of 1867, the civil and criminal law of England, as it existed in 1858, was made the law of the Colony so far as it was not from local circumstances inapplicable. By an Imperial statute of 1866 the Colony of Vancouver Island was united with and thenceforth became part of the Colony of British Columbia.

In 1871 British Columbia was admitted, under s. 146 of the British North America Act, into the Union of Provinces which that Act constituted. The instrument by which the union was actually effected was an Order in Council, but it was necessarily based on addresses from both Houses of the Canadian Parliament, and from the Legislative Council of British Columbia. These addresses contained the terms and conditions upon which these two quasi-independent communities proposed, through their respective Legislatures, that the union should be effected, and these terms and conditions, so far as approved of by their then Sovereign, were intended to be embodied in the Order in Council effecting the union, which was to have the same effect as if it had been enacted by the Parliament of the United Kingdom.

[1914] *A. C.* *p.* 164.

The Order in Council dated May 16, 1871, recites that each of the several things had been done which were required by s. 146 of the British North America Act, and the terms and conditions proposed in the addresses and approved of by the Crown are annexed to this Order. By paragraph 5, sub-head E, of these latter, Canada, i.e., the Dominion of Canada, undertook to assume the protection and encouragement of fisheries and defray the expenses of the same, and thereby became bound so to do. By the first clause of paragraph 11, the Dominion also undertook amongst

other things to secure the commencement within two years from the date of the union of, and to complete within ten years, a railway from the Pacific coast to such a point east of the Rocky Mountains, to be selected, as would secure that the seaboard of British Columbia should be connected with the railway system of Canada. By the second clause of paragraph 11 the Government of British Columbia became bound to convey to the Dominion Government, or rather to the Crown in right of the Dominion, in trust to be appropriated in such manner as the Dominion Government should deem advisable in furtherance of the construction of this railway, a certain extent of public lands, therein described, lying along the railway line throughout its entire length, not to exceed twenty miles in extent on each side of the line, and in consideration of this the Dominion Government undertook to pay to the Government of British Columbia 100,000 dollars per annum. Neither the Legislature of the Province of British Columbia nor that of the Dominion has power by legislation to alter the terms of this Order in Council (which is in effect an Imperial statute), or to relieve themselves from the obligations it imposes upon them.

Both the Dominion Government and the Government of British Columbia have performed the obligations thus imposed upon them. The Canadian Pacific Railway has been constructed, which connects the eastern seaboard of Canada with the western seaboard of British Columbia. On the other hand the Legislature of British Columbia has passed two statutes, namely, 43 Vict. c. 11 and 47 Vict c. 14, in order to discharge the obligation to grant what is now known as the railway belt (so far as it lies within the Colony) to the Government of the Dominion of Canada. By the combined effect of these statutes there was granted to the Dominion Government in trust to be appropriated as to the Government might seem advisable the public lands along the line of the Canadian Pacific Railway wherever it might finally be located to a width of twenty miles on each side of the said line as provided in paragraph 11 of the terms annexed to the Order in Council admitting the Province of British Columbia into confederation with the other Colonies of the Dominion.

[1914] *A. C.* *p.* 165.

The construction of the language of the grant of the railway belt has already come before this Board on more than one occasion. In *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1) it was decided that the grant was in substance an assignment of the rights of the Province to appropriate the territorial revenues arising from the land granted. Nevertheless it was held that it did

(1) 14 App. Cas. 295, *ante*, p. 403.

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not include precious metals which belonged to the Crown in right of the Province, because, as was said by Lord Watson, such precious metals are not partes soli or incidents of the land in which they are found, but belong to the Crown as of prerogative right, and there are no words in the conveyance purporting to transfer Royal or prerogative as distinguished from ordinary rights. It was pointed out in the judgment in that case that the word "grant" as used in the statute under construction was not, strictly speaking, suitable to describe a mere transfer of the provincial right to manage and settle the land and appropriate its revenues. The title remained in the Crown, whether the right to administer was that of the Province or that of the Dominion. It is true that in the course of the judgment Lord Watson also expressed the view that when the Dominion had disposed of the land to settlers it would again cease to be public land under Dominion control and revert to the same position as if it had been settled by the Province without ever having passed out of its control. Their Lordships, however, have not on the present occasion to consider questions which might arise if this had taken place, inasmuch as the belt, so far as is material for the purposes of this appeal, is still unsettled and remains under the control of the Dominion.

[1914] *A. C.* *p.* 166.

Their Lordships can see nothing in the judgment above referred to which casts the slightest doubt upon the conclusion to which they have come from a direct consideration of the terms of the grant itself, namely, that the entire beneficial interest in everything that was transferred passed from the Province to the Dominion. There is no reservation of anything to the grantors. The whole solum of the belt lying between its extreme boundaries passed to the Dominion, and this must include the beds of the rivers and lakes which lie within the belt. Nor can there be any doubt that every right springing from the ownership of the solum would also pass to the grantee, and this would include such rights in or over the waters of the rivers and lakes as would legally flow from the ownership of the solum. This view is in harmony with what has been decided by this Board in another case in which the effect of the grant of the railway belt came into question, *Burrard Power Co.* v. *Rex* (1), where it was held that a grant of water rights on a lake and river within the belt made by the Government of the Province was void. The grounds of the decision of the Board in that case were that the grant of the lands to the Dominion had passed the water rights incidental to the lands, and that these lands, so long as unsettled, were public property within the meaning of s. 91 of the British North America Act, and were, therefore, under the exclusive

(1) [1911] A. C. 87, *ante*, p. 692.

legislative authority of the Dominion, and could not be dealt with under a Water Clauses Act passed by the Provincial Government.

During the course of the argument, some reliance was placed by counsel for the Province of British Columbia on the fact that by the supplemental agreement recited in the preamble to the British Columbian Act of 1883 the Dominion is with all convenient speed to offer for sale the lands within the railway belt to settlers. But their Lordships are unable to see how this can affect the question of what passed to the Dominion under the so-called grant. They are unable to see any ground for construing the grant of the railway belt as excluding such lands situated within it as are covered with water. The solum of a river bed is a property differing in no essential characteristic from other lands. Ownership of a portion of it usually accompanies riparian property and greatly adds to its value. The minerals under it can be worked, and in addition there are special rights which flow from its ownership which are of themselves valuable and may be made the subject of sale. And even in view of the construction of the railway itself the possession of the solum of the rivers or lakes might become most essential in connection with the building of bridges, &c. Moreover, in districts situated at a distance from the actual railway track, the power of using the solum of the river for the purpose of the construction of bridges might be essential to the settling and disposal of adjacent lands. The plain language of the grant leaves it, in their Lordships' opinion, impossible to imply any limitations of the generality of that language or to make its operation dependent on whether land situated in the belt was or was not covered with water, or, if so covered, whether the rivers or lakes that cover it were of small or large dimensions. The whole solum within the belt with all the rights appertaining thereto passed to the Dominion.

[1914] A. C. p. 167.

In the present case, therefore, their Lordships entertain no doubt that the title to the solum and the water rights in the Fraser and other rivers and the lakes so far as within the belt are at present held by the Crown in right of the Dominion, and that this title extends to the exclusive management of the land and to the appropriation of its territorial revenues. It remains to consider the consequences as regards fishing rights. These are, in their Lordships' opinion, the same as in the ordinary case of ownership of a lake or river bed. The general principle is that fisheries are in their nature mere profits of the soil over which the water flows, and that the title to a fishery arises from the right to the solum. A fishery

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may of course be severed from the solum, and it then becomes a profit à prendre in alieno solo and an incorporeal hereditament. The severance may be effected by grant or by prescription, but it cannot be brought about by custom, for the origin of such a custom would be an unlawful act. But apart from the existence of such severance by grant or prescription the fishing rights go with the property in the solum.

[1914] *A. C.* *p.* 168.

The authorities treat this broad principle as being of general application. They do not regard it as restricted to inland or non-tidal waters. They recognize it as giving to the owners of lands on the foreshore or within an estuary or elsewhere where the tide flows and reflows a title to fish in the water over such lands, and this is equally the case whether the owner be the Crown or a private individual. But in the case of tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which is prima facie in the public. Lord Hale in his De Jure Maris, in a passage cited with approval by Lord Blackburn in his judgment in *Neill* v. *Duke of Deconshire* (1) states the law as follows: "The right of fishing in this sea" (i.e., the narrow seas adjoining the coasts) "and the creeks and arms thereof, is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. . . . But though the King is the owner of this great waste, and as a consequence of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks, or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty."

Although their Lordships agree with Lord Blackburn in his approval of this citation from De Jure Maris, their Lordships must not be understood as assenting to all the expressions used by Lord Hale, and more especially to his assumption that the Crown is owner of the solum of what he speaks of as the narrow seas. In Lord Hale's time the conception even of the three-mile limit did not exist, and it is clear that Lord Hale meant to include in the dominion of the Crown something much wider even than this. Nor do they think that Lord Blackburn's approval was intended by him to relate to this point, it being quite irrelevant to the case

[1914] *A. C.* *p.* 169.

(1) 8 App. Cas. 135, at p. 177.

which he had under his consideration at the time. But their Lordships are in entire agreement with him on his main proposition, namely, that the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject, without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed, it did not in fact first take rise in them. The right into which this practice has crystallized resembles in some respects the right to navigate the seas or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding its subjects exercising this right as from immemorial antiquity the Crown as parens patriæ no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the Courts.

But to the practice and the right there were and indeed still are limits, or perhaps one should rather say exceptions. "The King," says Lord Hale in another passage (De Jure Maris, printed at p. 373 of Stuart Moore's History and Law of the Foreshore and Sea Shore, 3rd ed.), "used to put as well fresh as salt rivers in defenso for his recreation, that is, to bar fishing or fowling in a river till the King had taken his pleasure or advantage of the writ or precept de defensione ripariæ, which anciently was directed to the sheriff to prohibit riviation in any rivers in his bailiwick. But by that statute it is enacted quod nullæ ripariæ defendantur de cætero, nisi illæ quæ fuerunt in defenso tempore Henrici regis avi nostri, et per eadem loca et per eosdem terminos, sicut esse consueverunt tempore suo." The words of Magna Charta quoted by Lord Hale are of a very general character, and are not confined to tidal waters. If they had remained unconstrued by the Courts doubts might well have been entertained, as pointed out by Lord Blackburn in *Neill* v. *Duke of Devonshire* (1), whether the 16th chapter, which contains the words cited, did more than restrain the writ de defensione ripariæ, by which, when the King was about to come into a county, all persons might be forbidden from approaching the banks of the rivers, whether tidal or not, in order that the King might have his pleasure in fowling and fishing. If this

[1914] A. C. p. 170.

(1) 8 App. Cas. 135, at p. 177.

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were the true interpretation of the words of Magna Charta it would indicate that the general right of the public to fish in the sea and in tidal waters had been established at an earlier date than Magna Charta, so that it was only necessary at that date to guard the subject from the temporary infractions of that right by the Crown in the rivers as well tidal as non-tidal which were covered by the writ de defensione ripariæ. But this is a matter of historical and antiquarian interest only. Since the decision of the House of Lords in *Malcolmson* v. *O'Dea* (1), it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation. This is now part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia.

Such, therefore, is undoubtedly the general law as to the public right of fishing in tidal waters. But it does not apply universally. To the general principle that the public have a "liberty of fishing in the sea or creeks or arms thereof," Lord Hale makes the exception, "unless in such places, creeks, or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty." This passage refers to certain special cases of which instances are to be found in well-known English decisions where separate and exclusive rights of fishing in tidal waters have been recognized as the property of the owner of the soil. In all such cases the proof of the existence and enjoyment of the right has of necessity gone further back than the date of Magna Charta. The origin of these rare exceptions to the public right is lost in the darkness of the past as completely as is the origin of the right itself. But it is not necessary to do more than refer to the point in explanation of the words of Lord Hale, because no such case could exist in any part of British Columbia, inasmuch as no rights there existing could possibly date from before Magna Charta.

[1914] *A. C.* *p.* 171.

It follows from these considerations that the position of the rights of fishing in the rivers, lakes, and tidal waters (whether in rivers and estuaries or on the foreshore) within the railway belt stand prima facie as follows: In the non-tidal waters they belong to the proprietor of the soil, i.e., the Dominion, unless and until they have been granted by it to some individual or corporation. In the tidal waters, whether on the foreshore or in creeks, estuaries, and tidal rivers, the public have the right to fish, and by reason of the provisions of Magna Charta no restriction can be put upon that right of the public by an exercise of the prerogative in the

(1) 10 H. L. C. 593.

form of a grant or otherwise. It will, of course, be understood that in speaking of this public right of fishing in tidal waters their Lordships do not refer in any way to fishing by kiddles, weirs, or other engines fixed to the soil. Such methods of fishing involve a use of the solum which, according to English law, cannot be vested in the public, but must belong either to the Crown or to some private owner. But we now come to the crux of the present case. The restriction above referred to relates only to Royal grants, and what their Lordships here have to decide is whether the Provincial Legislature has the power to alter these public rights in the same way as a sovereign Legislature, such as that of the United Kingdom, could alter the law in these respects within its territory.

To answer this question one must examine the limitations to the powers of the Provincial Legislature which are relevant to the question under consideration. They arise partly from the provisions of ss. 91 and 92 of the British North America Act, 1867, and partly from the Terms of Union of British Columbia with the Confederation with which we have already dealt. By s. 91 of the British North America Act, 1867, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within (amongst other things) "sea coast and inland fisheries." The meaning of this provision was considered by this Board in the case of *Attorney-General for the Dominion* v. *Attorneys-General for the Provinces* (1), and it was held that it does not confer on the Dominion any rights of property, but that it does confer an exclusive right on the Dominion to make restrictions or limitations by which public rights of fishing are controlled, and on this exclusive right provincial legislation cannot trench. It recognized that the Province retains a right to dispose of any fisheries to the property in which the Province has a legal title, so far as the mode of such disposal is consistent with the Dominion right of regulation, but it held that, even in the case where proprietary rights remain with the Province, the subject-matter may be of such a character that the exclusive power of the Dominion to legislate in regard to fisheries may restrict the free exercise of provincial rights. Accordingly it sustained the right of the Dominion to control the methods and season of fishing and to impose a tax in the nature of licence duty as a condition of the right to fish, even in cases in which the property in the fishery originally was or still is in the Provincial Government.

[1914] *A. C.* p. 172.

The decision in the case just cited does not, in their Lordships' opinion, affect the decision in the present case. Neither in 1867 nor

(1) [1898] A. C. 700, *ante*, p. 553.

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at the date when British Columbia became a member of the Federation was fishing in tidal waters a matter of property. It was a right open equally to all the public, and therefore, when by s. 91 sea coast and inland fisheries were placed under the exclusive legislative authority of the Dominion Parliament, there was in the case of the fishing in tidal waters nothing left within the domain of the Provincial Legislature. The right being a public one, all that could be done was to regulate its exercise, and the exclusive power of regulation was placed in the Dominion Parliament. Taking this in connection with the similar provision with regard to "navigation and shipping" their Lordships have no doubt that the object and the effect of these legislative provisions were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament, and to leave to the Province no right of property or control in them. It was most natural that this should be done, seeing that these rights are the rights of the public in general and in no way special to the inhabitants of the Province.

[1914] *A. C.* *p.* 173.

These considerations enable their Lordships to answer the first question, which reads as follows:—

"Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right to fish in any or what part or parts of the waters within the railway belt—(*a*) as to such waters as are tidal, and (*b*) as to such waters which, though not tidal, are navigable?"

The answer to this question must be in the negative. So far as the waters are tidal the right of fishing in them is a public right subject only to regulation by the Dominion Parliament. So far as the waters are not tidal they are matters of private property, and all these proprietary rights passed with the grant of the railway belt, and became thereby vested in the Crown in right of the Dominion. The question whether non-tidal waters are navigable or not has no bearing on the question. The fishing in navigable non-tidal waters is the subject of property, and according to English law must have an owner and cannot be vested in the public generally.

They now come to the second question, which is: "Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right, or any right, to fish below low water mark in or in any or what part or parts of the open sea within a marine league of the coast of the Province?"

Their Lordships have already expressed their opinion that the

right of fishing in the sea is a right of the public in general which does not depend on any proprietary title, and that the Dominion has the exclusive right of legislating with regard to it. They do not desire to pass any opinion on the question whether the subjects of the Province might, consistently with s. 91, be taxed in respect of its exercise for the reasons pointed out by Lord Herschell (1), but no such taxing could enable the Province to confer any exclusive or preferential right of fishing on individuals, or classes of individuals, because such exclusion or preference must import regulation and control of the general right of the public to fish, and this is beyond the competence of the Provincial Legislature.

[1914] *A. C.* p. 174.

In the argument before their Lordships much was said as to an alleged proprietary title in the Province to the shore around its coast within a marine league. The importance of claims based upon such a proprietary title arises from the fact that they would not be affected by the grant of the lands within the railway belt. But their Lordships feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low water mark to what is known as the three-mile limit because they are of opinion that the right of the public to fish in the sea has been well established in English law for many centuries and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land.

They desire, however, to point out that the three-mile limit is something very different from the "narrow seas" limit discussed by the older authorities, such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone comprised in the former limit owes its origin to comparatively modern authorities on public international law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a Conference, it is not desirable that any municipal tribunal should pronounce on it. It is not improbable that in connection with the subject of trawling the topic may be examined at such a Conference. Until then the conflict of judicial opinion which arose in *Reg.* v. *Keyn* (2) is not likely to be satisfactorily settled, nor is a conclusion likely to be reached on the question whether the shore below low water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and

[1914] *A. C.* p. 175.

(1) [1898] A. C. at p. 713. (2) 2 Ex. D. 63.

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police purposes. The obscurity of the whole topic is made plain in the judgment of Cockburn, C.J., in that case. But apart from these difficulties, there is the decisive consideration that the question is not one which belongs to the domain of municipal law alone.

Their Lordships therefore find themselves in agreement with the Supreme Court of Canada in answering the first and second questions in the negative.

The principles above enunciated suffice to answer the third question, which relates to the right of fishing in arms of the sea and the estuaries of rivers. The right to fish is in their Lordships' opinion a public right of the same character as that enjoyed by the public on the open seas. A right of this kind is not an incident of property, and is not confined to the subjects of the Crown who are under the jurisdiction of the Province. Interference with it, whether in the form of direct regulation, or by the grant of exclusive or partially exclusive rights to individuals or classes of individuals, cannot be within the power of the Province, which is excluded from general legislation with regard to sea coast and inland fisheries.

Their Lordships think that what they have now said affords a sufficient answer to the third question. It is in the negative. They will humbly advise His Majesty that the three questions should be answered in the fashion they have indicated. In accordance with the usual practice in such cases there will be no costs of this appeal.

Solicitors for appellant: *Gard, Rook & Co.*
Solicitors for respondent: *Charles Russell & Co.*
Solicitors for intervenants: *Blake & Redden.*

COTTON *v.* THE KING [1914], A. C. 176

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July 11, 14, 15, 16, 21, 22; *Nov.* 11.

CHARLES S. COTTON AND ANOTHER . . APPELLANTS;

AND

THE KING . . . . . RESPONDENT.

AND CONSOLIDATED CROSS-APPEAL.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Revenue—Succession Duties—Province of Quebec—Property outside Province—Powers of Provincial Legislature—Direct Taxation—Ultra vires—55 & 56 Vict. c. 17, s. 1, art. 1191b—Quebec Succession Duties Act (6 Edw. 7, c. 11), s. 1, arts. 1191b and 1191c—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92.

Held, (1.) that neither the Quebec Succession Duties Act of 1906 nor the Succession Duties Act of that Province passed in 1892 upon its true

* *Present:*—VISCOUNT HALDANE, L.C., LORD ATKINSON and LORD MOULTON.

construction imposes any duty upon the transmission of movable property outside the Province; (2) that the taxation imposed by the Quebec Succession Duties Act of 1906 is not "direct taxation" within the meaning of the British North America Act, 1867, s. 92, and is consequently ultra vires the Legislature of the Province.

Consolidated appeal and cross-appeal by special leave from a judgment of the Supreme Court (February 20, 1912) which reversed in part the judgment of the Court of King's Bench (Appeal side) of Quebec (June 30, 1910) confirming with a variation the judgment of the Superior Court of Quebec (January 17, 1900).

The litigation giving rise to the appeal and cross-appeal followed upon the claim of the Government of the Province of Quebec to the payment of succession duty in respect of the estates of Charlotte L. Cotton and of Henry H. Cotton, her husband. Charlotte L. Cotton died on April 11, 1902, leaving an estate consisting in part of property in the said province and in part of bonds, debentures, shares in industrial companies, and other movable property locally situated in the United States of America. At the time of her death she was domiciled in the Province of Quebec. By her will, after making certain specific bequests, she left the residue of her estate to her husband, Henry H. Cotton, whom she appointed her executor. [1914] *A. C.* p. 177.

At the time of the death of Charlotte L. Cotton the law in force in the Province of Quebec as to succession duties was contained in 55 & 56 Vict. c. 17 (1) and in subsequent amending statutes (57 Vict. c. 16, 58 Vict. c. 16, and 59 Vict. c. 17) which did not affect the questions arising upon the appeals.

The Government of the Province of Quebec claimed and received from Henry H. Cotton, as executor of the will of the said Charlotte L. Cotton, succession duties at the statutory rate upon the whole net property passing under the will of his said wife.

On December 26, 1906, the said Henry H. Cotton died domiciled in the said province, leaving estate consisting in part of property in the Province of Quebec and in part of bonds, debentures, shares in industrial companies, and other securities and movable property locally situated in the United States of America.

At the time of the death of Henry H. Cotton the law in force in the Province of Quebec as to succession duties was contained

(1) 55 & 56 Vict. (Quebec) c. 17, s. 1, enacts the following article:— "1191b. All transmissions, owing to death, of the property in, usufruct or enjoyment of, movable and immovable property in the Province shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death" (then follow provisions, amended by 57 Vict. c. 16, as to the rates of payment).

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in the statute 6 Edw. 7, c. 11 (the Quebec Succession Duties Act) (1).

The Government of the province claimed from the executors of the said Henry H. Cotton (the appellants in the principal appeal and herein called the appellants) succession duties at the statutory rate calculated upon the whole net property passing under his will.

On July 12, 1909, the appellants filed in the Superior Court of Quebec a petition of right praying for a declaration that His Majesty was indebted in the right of the Province of Quebec to the appellants in the sum of $31,492 with interest, the said sum being the aggregate of the amounts of succession duties paid upon the estates of Charlotte L. Cotton and of Henry H. Cotton respectively upon the said movable property locally situated in the United States of America and outside the said province.

The judgment of the Superior Court was delivered on January 17, 1910, by Malouin, J., holding that the appellants were entitled to the amounts claimed on the ground that under the British North America Act, 1867, s. 92, enumeration 2, the Legislature of the Province of Quebec had not the right to tax movable property situated outside the limits of the province.

From this decision the respondent appealed to the Court of King's Bench (Appeal side), and on June 30, 1910, that Court delivered judgment confirming, with a slight modification, the judgment of the Superior Court, the said judgment being modified by declaring that the debts of Henry H. Cotton should be deducted from the total assets and not from the assets in the Province of Quebec alone. The judgment of the Court was delivered by Carroll, J.; it was to the effect that the case was governed by the decision in *Woodruff* v. *Attorney-General for Ontario* (2), and that even if the tax was in form imposed upon the transmission and not upon the property it would be invalid as being an attempt to do indirectly what the Legislature is forbidden to do directly.

The respondent appealed to the Supreme Court, and the appellants cross-appealed as to the above modification in the judgment of the Superior Court. On February 20, 1912, the Supreme Court delivered

(1) 6 Edw. 7, c. 11, s. 1, re-enacts art. 1191b, above set out, with the addition of the words "or the" before "usufruct," and further enacts the following article: — "1191c. The word 'property' within the meaning of this section shall include all property, whether moveable or immoveable, actually situate or owing within the Province, whether the deceased at the time of his death had his domicile within or without the Province, or whether the debt is payable within or without the Province, and whether the transmission takes place within or without the Province, and all moveables, wherever situate, of persons having their domicile (or residing) in the Province of Quebec at the time of their death."

(2) [1908] A. C. 508.

judgment, allowing the appeal by a majority of four (Fitzpatrick, C.J., Idington, Duff, and Brodeur, JJ.) to two (Davies and Anglin, JJ.) in so far as the estate of Henry H. Cotton was concerned, but dismissing by an equal division of opinion the appeal as to the estate of Charlotte L. Cotton. The cross-appeal as to the modification above referred to was dismissed, and there was no appeal from this part of the decision. The effect of the judgments in the Supreme Court (which are reported at 45 Can. S. C. R. 469) was shortly as follows: The learned Chief Justice considered that the statutes in force at the death of Charlotte L. Cotton did not purport to extend to property actually outside the province, but that the effect of the introduction into the Succession Duties Act, 1906, of the definition of "property" was to extend that statute to all property devolving under the law of the province, whether situated within or without the province. As to the power of the Legislature of the province to enact such a law, the learned Chief Justice, applying the principle mobilia sequuntur personam, held that the intention of the Legislature was to tax the transmission of title, and that the succession was to be looked upon as a universitas, in which, by virtue of the law under which succession devolved, the representative could get no title until the duty imposed by law had been paid. Idington, Duff, and Brodeur, JJ., each delivered a judgment in favour of allowing both appeals upon grounds in the main similar to those of the Chief Justice. They considered that *Woodruff's Case* (1) was distinguishable. Davies, J., and Anglin, J., were each of opinion that the appeal should be dismissed as to both estates. The latter learned judge, while agreeing with the learned Chief Justice that the definition of property in the Act of 1906 had the effect of extending the ambit of the tax to property outside the province, differed from him in that he held that such a tax was ultra vires the power of the Provincial Legislature as not being taxation within the province. The question whether the tax was ultra vires the Legislature on the ground that it was not direct taxation was considered only by Idington, J., and Duff, J., each of whom was of opinion that it was direct taxation.

[1914] *A. C.* *p.* 179.

R. C. Smith, K.C., *T. Chase-Casgrain*, K.C., and *Geoffrey Lawrence*, for the appellants. Succession duty was not payable, either upon the death of the wife or upon that of the husband, in respect of that part of their respective estates which consisted, of movable property outside the province, and the appellants are entitled to recover the amounts paid subject to the modification made in the Court of King's Bench. The duties in force both in 1902 and in 1906 are by art.

[1914] *A. C.* *p.* 180.

(1) [1908] A. C. 508.

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1191b as enacted by 55 & 56 Vict. c. 17, s. 1, and by the Succession Duties Act, 1906 (6 Edw. 7, c. 11), imposed only upon "moveable and immoveable property in the province." By the use of those express words the application of the maxim mobilia sequuntur personam is excluded. The French version of art. 1191b, in which "situés dans la province" necessarily refers to the word "biens," makes it clear that the Acts impose the tax upon property situated in the province, and not upon a transmission in the province of property situated elsewhere. Arts. 1191d and 1191e (provided by the Act of 1906) are only consistent with the duty being imposed upon the property and not upon the transmission. The definition of property introduced into the Succession Duties Act of 1906 by art. 1191c cannot have the effect of extending the operation of art. 1191b of that Act, because whatever the meaning of the word property the scope of the taxation is limited by that article to so much of the property as is within the province. The words "in the province" were inserted in the Acts in order to prevent the taxation from being ultra vires the Provincial Legislature. If the effect of the enactments in force in 1902 or in 1906 is to impose a tax in respect of property outside the province the taxation is ultra vires the power of the Provincial Legislature as to taxation, which is limited by the British North America Act, s. 92, to direct taxation within the province. The judgment in *Woodruff* v. *Attorney-General for Ontario* (1) conclusively shews that if the effect of the statute is to impose a tax upon a transmission within the province of property locally situated outside its limits, the Legislature would be merely attempting to do indirectly that which it is precluded from doing directly. [*Blackwood* v. *Reg.* (2) and *Lambe* v. *Manuel* (3) were referred to.] The decision in *Rex* v. *Lovitt* (4) is distinguishable because the basis of that decision was that the property was held not to be situated in New Brunswick for the purpose of the Act. Although the construction of an Act of Parliament will not be limited in order to avoid overlapping of taxation with a foreign jurisdiction, this is a consideration in ascertaining the limits of provincial Legislatures inter se. Further, if the statute of 1906 extends the taxation as contended for, the taxation is not "direct taxation" within the meaning of s. 92, and is ultra vires: *Attorney-General for Quebec* v. *Reed* (5); *Bank of Toronto* v. *Lambe* (6); *Brewers' and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (7). The effect of the above decisions

[1914] *A. C.* *p.* 181.

(1) [1908] A. C. 508, *ante*, p. 662.
(2) (1882) 8 App. Cas. 82.
(3) [1903] A. C. 68, *ante*, p. 580.
(4) [1912] A. C. 212, *ante*, p. 700.
(5) (1885) 10 App. Cas. 141, *ante*, p. 360.
(6) (1887) 12 App. Cas. 575, *ante*, p. 378.
(7) [1897] A. C. 231, *ante*, p. 529.

is to adopt Mill's definitions of a direct and an indirect tax for the purpose of the Act. They are as follows: "A direct tax is one which is demanded direct from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs": Mill's Political Economy, bk. v., ch. 3. Under art. 1191g (5.) in the Act of 1906 payment of the duties has to be made by the person making the declaration of the property transmitted, who under art. 1191g (1.) may be the executor or the notary before whom the will is executed, he having to collect the amount paid from the estate or beneficiaries. The duties are therefore not a direct tax within that definition. [*Colquhoun* v. *Brooks* (1) was also referred to.]

Sir R. Finlay, K.C., *Geoffrion, K.C.*, and *T. Mathew*, for the respondent. Upon the true construction of the statutes the transmission of movable property, wherever situated, belonging to a person domiciled within the province at his death is liable to the duties imposed. The duties are imposed upon the transmission and not upon the property. In the present case both the testators were domiciled at their death within the province and the transmission of the whole movable property took place there. By the words "in the province" there is included in the operation of the section not only property physically situated in the province, but also movable property which according to the maxim mobilia sequuntur personam is governed by the law of the testator's domicil: *Thomson* v. *Advocate-General* (2); *Wallace* v. *Attorney-General* (3); *Harding* v. *Commissioners of Stamps for Queensland* (4). The definition of property added in 1906 by art. 1191c must be given effect to as extending the scope of art. 1191b to movables, wherever situated, of persons having their domicil in Quebec. The words "in the province" in art. 1191b of the Act of 1906 should be treated as struck out, since they are inconsistent with the provision in art. 1191c. Even if the first part of art. 1191c would extend the taxation beyond the powers of the Legislature the latter part is intra vires, and the section should be read as limited by the powers of the Legislature: *Rex* v. *Lovitt* (5). The duties imposed are called by the Acts succession duties but are of the nature of probate duties having regard to art. 1191g (6.) of the Act of 1906. The view of the learned Chief Justice on this point was correct. It is intra vires a provincial Legislature to

[1914] *A. C.* p. 182.

(1) (1889) 14 App. Cas. 493.
(2) (1845) 12 Cl. & F. 1.
(3) (1865) L. R. 1 Ch. 1.
(4) [1898] A. C. 769.
(5) (1912) A. C. 212, *ante*, p. 700.

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impose a tax upon a transmission within the province of movable property situated elsewhere. The decision in *Woodruff* v. *Attorney-General for Ontario* (1) is distinguishable. In that case there was a transfer intra vires in New York, and this fact was the true basis of the decision. There is a vital distinction between a transfer of movable property intra vivos and a transmission of movable property by death, the former being governed by the lex situs and the latter by the law of the domicil of the deceased person: Dicey's Conflict of Laws, ed. 1908, r. 143, p. 519; r. 144, p. 522; pp. 750 et seq. *Woodruff's Case* (2) is also distinguishable on the ground that the statute there under discussion in terms imposed the tax upon the property and not upon its transmission. The succession duties imposed by the Acts are direct taxation. The object of the British North America Act, s. 92, in limiting the powers of the provincial Legislatures to imposing direct taxation was to prevent them from imposing customs and excise duties, and taxes strictly analogous thereto, which these succession duties are not. The provision that the person making the declaration required under the Act shall pay the duties cannot affect the character of the tax, but is only machinery for its collection. The payment is made by him on behalf of the persons liable and is entirely different from a payment of customs or excise, which there is no legal right to recover from another source. [In addition to Mill's definitions there were referred to Littré, Dict., s.v. "contribution"; Legrand, Dict. Usuel de droit, s.v. "contribution"; The Oxford Dict., s.v. "direct tax."] The taxation imposed by the Succession Duties Acts is more nearly analogous to that held to be intra vires in *Bank of Toronto* v. *Lambe* (3) and in *Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario* (4) than that held to be ultra vires in *Attorney-General for Quebec* v. *Queen Insurance Co.* (5) and in *Attorney-General for Quebec* v. *Reed* (6).

[1914] *A. C.* p. 183.

R. C. Smith, K.C., in reply.

1913 *Nov.* 11.

The judgment of their Lordships was delivered by

LORD MOULTON. In the principal appeal now before their Lordships the appellants are the executors under the last will and testament of Henry H. Cotton, late of Cowansville in the Province of Quebec. It raises the question whether the movable property of the testator situate outside the Province of Quebec is liable to duty under

(1) [1908] A. C. 508, *ante*, p. 662.
(2) *Ante*, p. 662.
(3) 12 App. Cas. 575, *ante*, p. 378.
(4) [1897] A. C. 231, *ante*, p. 529.
(5) (1878) 3 App. Cas. 1090, *ante*, p. 222.
(6) 10 App. Cas. 141, *ante*, p. 360.

the Quebec Succession Duties Act of 1906. In the cross-appeal the Crown is appellant and the above-mentioned executors are respondents, and it raises the question whether the movable property belonging to Charlotte Leland Cotton, the wife of Henry H. Cotton (who died on April 11, 1902), situated outside the Province of Quebec was liable to succession duty under the statutes then in force regulating such duty. The history of the litigation is as follows: At all material times Henry H. Cotton was domiciled in the Province of Quebec. His wife, Charlotte Leland Cotton, by her last will and testament, after making certain special bequests, left all the residue of her estate to her said husband, whom she appointed executor of her will. The value of the estate was proved to be $359,441. With the exception of property valued at $24,490, which was locally situate in the Province of Quebec, the estate consisted substantially of bonds, debentures, shares, &c., and it was locally situate in the United States of America. The Government of the Province of Quebec claimed duties upon the whole of the estate of the testatrix, and not only upon the portion situate in the Province of Quebec, and such duties amounting to $11,193·25 were accordingly paid by the said executor.

[1914] *A. C.* p. 184.

Henry H. Cotton died on December 26, 1906, and by his last will appointed the appellants his executors. The value of his estate was proved to be $341,385·38, of which property to the value of $11,074·46 and no more was locally situate in the Province of Quebec. The balance of the estate (consisting for the most part of bonds, debentures, shares, &c.) was locally situate in the United States of America. He also left debts to the amount of $4659·90, for which his estate was liable. The Government of the Province of Quebec claimed from the appellants as executors the sum of $21,360·42, being the duties calculated upon the whole net property passing under the will, and this sum the appellants were accordingly compelled to pay as such executors.

On July 12, 1909, the appellants filed a petition of right praying for a return of $10,548·55 in respect of the estate of Charlotte L. Cotton, and a sum of $20,943·47 in respect of the estate of Henry H. Cotton, on the ground that neither under the statute regulating the succession duty in the Province of Quebec at the date of the death of Charlotte L. Cotton, nor under the statute regulating the same at the date of the death of Henry H. Cotton, was movable property locally situate outside the Province of Quebec liable to pay succession duty. It is admitted on behalf of the Crown that (subject to a small correction in respect of the debts due by the said Henry H. Cotton at the date of his death) the said sums are correctly

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calculated, and also that, if the appellants are right in their contention that at neither of the said dates was the movable property locally situate outside the Province of Quebec legally liable to pay succession duty, the said executors are entitled to be repaid the sums so claimed by them subject to the said correction.

The case came on for hearing in the Superior Court of Quebec before Malouin, J., who on January 17, 1910, gave judgment for the appellants for the full amount of their claim with interest from July 12, 1909, and costs. From this decision the Crown appealed to the Court of King's Bench (Appeal side), and on June 30, 1910, that Court gave judgment confirming the judgment of the Superior Court subject to the reduction of the amount claimed by a sum of $393, the Court holding that the debts due from the estate of the said Henry H. Cotton should have been deducted pro rata from the property situated outside the Province of Quebec, and not entirely from that situated within that province. The correctness of this variation by the Superior Court is not contested by the appellants.

[1914] *A. C.* *p.* 185.

The respondent appealed from the above judgment of the Court of King's Bench to the Supreme Court of Canada, and on February 20, 1912, that Court delivered judgment to the following effect. The appeal so far as it related to the claim for the return of money overpaid in respect of the estate of Charlotte L. Cotton was dismissed, the six judges of the Court being equally divided on the point. The appeal with regard to the amount claimed to be overpaid in respect of the estate of Henry H. Cotton was allowed, the Court being of opinion, by a majority of four to two, that under the laws regulating succession duty in the Province of Quebec at the date of his death the whole of his estate was liable to pay such duty. A cross-appeal by the present appellants against the small correction mentioned above was dismissed, and from this dismissal no appeal has been brought.

The present appeals are brought from the above decisions of the Supreme Court of Canada. The appellants appeal from the decision relating to the duties upon the estate of Henry H. Cotton, and the Crown appeals as to the decision so far as it affects the duties upon the estate of Charlotte L. Cotton. It will be seen, therefore, that the matter in dispute is solely as to the effect of the statutes regulating succession duty at the dates of the death of Charlotte L. Cotton and Henry H. Cotton respectively.

At the date of the death of Charlotte L. Cotton, the section imposing succession duty, which was in force, reads as follows:—

[1914] *A. C.* *p.* 186.

"All transmissions owing to death of the property, in usufruct or enjoyment of, moveable and immoveable property in the province

shall be liable to the following taxes calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death." The French text reads as follows: "Toute transmission, par décès de propriété, d'usufruit ou de jouissance de biens mobiliers ou immobiliers, situés dans la province est frappée des droits suivants, sur la valeur du bien transmis, déduction faite des dettes et charges existant au moment du décès." There is no definition of "property," and the remainder of the group of sections and sub-sections relates to the rates of duty, the mode of payment, and the formalities to be gone through in connection with the succession.

Their Lordships are of opinion that no question of difficulty or doubt arises in this part of the case. By the express words of the taxing section the taxation is expressly limited to the property "in the province," or in the French text, "biens . . . . situés dans la province." The meaning of these words is clear. Neither party denies that movable property can be locally situate in a place, and in the present case the property as to which the dispute arises was locally situate in the United States of America, and therefore not in the Province of Quebec. No question arises as to the applicability of the doctrine mobilia sequuntur personam, because the section expressly limited the taxation to property in the province, and therefore whether or not the province possessed and might have exercised a right to tax movable property locally situated outside of the province (such right arising from the domicil of the testatrix) it did not see fit so to do. For the same reason no question of ultra vires arises in this part of the case, since the appellants do not dispute the power of the Quebec Legislature to tax movable property situated in the province.

The cross-appeal of the Crown therefore fails.

There remains the appeal of the appellants. The bulk of the careful and elaborate arguments upon these appeals was devoted to this part of the case. It was distinguished from the case on the cross-appeal by the fact that the legislation in force at the date of the death of Mrs. Cotton had been repealed before the death of her husband, and the succession duties on the husband's estate were entirely regulated by the terms of an Act passed in 1906, entitled the Quebec Succession Duties Act. In this Act the operative part of the actual taxing section of the former legislation is reproduced with a minute verbal alteration which admittedly makes no difference. But there is inserted in the section a definition which did not appear in any of the former Acts. It reads as follows: "1191c. The word 'property' within the meaning of this

[1914] *A. C.* *p.* 187.

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section shall include all property, whether moveable or immoveable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all moveables wherever situate of persons having their domicile (or residing) in the Province of Quebec at the time of their death."

The respondent contends that the presence of this definition extends the operative clause so as to make it cover all movable property possessed by the testator wherever situate. The appellants deny that it has any such effect, and further contend that, if it has such effect, the enactment is thereby rendered ultra vires of the Provincial Legislature, and is of no validity. These are the two questions which this Board has to resolve, and though it may well be that the decision of one of these questions in favour of the appellants might render it unnecessary to decide the other, their Lordships are of opinion that they are of co-ordinate importance in the case, and that they should base their judgment equally on the answers to be given to the one and to the other. The latter of the two questions is of the greater practical importance in view of the fact that by a later statute the operative portion of the section has been amended by omitting the qualifying words "in the province," so that a decision depending on the presence of those words would have no application to the present state of legislation.

Taking the first of the two questions their Lordships are asked to decide whether the presence of the definition has the effect of removing the words of limitation "in the province" from the operative part of the section. It is difficult to see how it can be contended that they have that effect. Under the earlier legislation there was no specific definition of property, and therefore it would be interpreted in its natural sense, i.e., the totality of all that the testator owned whatever its nature and wherever its situation. The specific definition that appears in the later legislation is not and could not be wider than this. It is true that it may indicate that the section is intended to apply to a wider class of owners than would be affected under the former legislation, because it refers to persons not domiciled within the province. Such a breadth of application may perhaps give rise to questions in the future, but they do not arise here. In the case of a person who is domiciled in the province, and who, therefore, is naturally subject to the operative clause (as Henry H. Cotton undoubtedly was), it makes nothing "property" which would not have been considered "property" if no specific

[1914] *A. C.* *p.* 188.

definition existed. The same consideration which was decisive in the former case therefore applies with equal force here. By the words of limitation inserted in the operative clause the Legislature makes it clear that it does not intend to tax the whole of the "property" of the deceased, but only those of his goods which are "situés dans la province." It is no longer a question of the powers of the Legislature. Whatever they may be, it has chosen to exercise them only so far as the property locally situated within the province is concerned.

The necessity of this conclusion appears more strikingly when we examine that part of the definition on which the argument for the respondent was exclusively based. Counsel relied on the presence at the end of the definition of the words "all moveables wherever situate of persons having their domicile (or residing) in the Province of Quebec at the time of their death." But the things so referred to would obviously be included in the word "property" as used in the earlier statutes—indeed, they could not be excluded from any concept of the property of the deceased. And, moreover, its presence emphasizes the deliberate use of limiting words in the operative clause. The definition prescribes that "property" includes movables "wherever situate," but the express language of the operative clause provides that of this "property" those portions only are taxed which are "biens situés dans la province." [1914] *A. C.* *p.* 173.

An attempt was made to suggest that this definition of "property" could only have been inserted in the Act to indicate that on which it was the intention to levy the duties, and that therefore the operative clause must be read as co-extensive with the definition. But apart from the fact that the language of the operative clause is fatal to this argument, the group of clauses itself shews a good reason for inserting a definition of property wide enough to cover all that the testator possessed quite independently of the question whether duties should be levied on the whole of the property or not. By the provisions of art. 1191g the executor or some party interested under the will must make a declaration under oath, setting forth, among other things, "the description and real value of all property transmitted." This is a matter of great importance to those who collect the revenue, because they are able to judge for themselves as to the amount of the duties leviable, or, in other words, to perform the duty imposed upon the collector by sub-s. 6, i.e., to prepare "a statement of the duties to be paid by the declarant." Other provisions of the group of clauses illustrate in a similar way the use of the word "property" without any restrictive words in this group of clauses, and fully account for the breadth

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of the definition without in any way detracting from the force and effect of the limitation which is found in the operative clause.

On the above ground, therefore, their Lordships are of opinion that this appeal must be allowed.

There is, however, as has been already pointed out, a second question in the case, the decision of which in favour of the appellants would lead to the same result. This question is the following: whether a succession duty of the kind contended for by the respondent could be imposed by the Provincial Legislature without exceeding its powers. In considering this point we may assume that the operative clause specifically extends to the taxation of all the property of the testator as defined in the statute, or, to express it more simply, that the limiting words, "in the province," have been deleted from that clause. Their Lordships have to decide whether an enactment in such a form would be within the powers of the Provincial Legislature by reason of the taxation imposed by it being "direct taxation within the province in order to the raising of a revenue for provincial purposes" within the meaning of s. 92 of the British North America Act, 1867.

[1914] *A. C.* *p.* 190.

The language of this provision of the British North America Act, 1867, marks an important stage in the history of the fiscal legislation of the British Empire. Until that date the division of taxation into direct and indirect belonged solely to the province of political economy so far as the taxation in Great Britain or Ireland or in any of our colonies is concerned; and although all the authors of standard treatises on the subject recognized the existence of the two types of taxation, there cannot be said to have existed any recognized definition of either class which was universally accepted. Each individual writer gave his own description of the characteristics of the two classes, and any difference in the descriptions so given by different writers would necessarily lead to differences in the delimitation of the two classes, so that one authority might hold a tax to be direct which another would class as indirect. But so long as the terms were only used in connection with the theoretical treatment of the subject this state of things gave rise to no serious inconvenience. The British North America Act changed this entirely. "Direct taxation" is employed in that statute as defining the sphere of provincial legislation, and it became from that moment essential that the Courts should for the purposes of that statute ascertain and define the meaning of the phrase as used in such legislation.

Numerous cases were quoted to us in which the question has been dealt with by this Board. The earliest of these cases occurred

in 1884, namely, *The Attorney-General for Quebec* v. *Reed* (1), in which the opinion of this Board was delivered by the Earl of Selborne, L.C. The Act in question in that case was an Act imposing a duty of ten cents upon every exhibit filed in Court in any action. The funds so raised were intended to pass into the general revenue of the province, and their Lordships held that such an impost came precisely within the words "taxation in order to the raising of a revenue for provincial purposes." The sole remaining question, therefore, was whether such taxation was "direct," and his Lordship, in delivering the opinion of the Board, says as follows: "Now it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill, and those who agree with him, is less unfavourable to the appellants' arguments than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the ultimate incidence of the taxation as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are printed here from Mr. Mill's book on political economy—'one which is demanded from the very persons who it is intended or desired should pay it.' And then, the converse definition of indirect taxes is, 'those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.'"

Applying this definition, he pronounces that a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice is not one which is demanded from the very persons whom it is intended or desired should pay it, and that, therefore, the taxation in question was not "direct." The Act was accordingly held to be ultra vires.

The question next came before this Board in the year 1887 in the case of *Bank of Toronto* v. *Lambe* (2). The Quebec Legislature had in the year 1882 passed an Act levying a tax upon every bank carrying on the business of banking in the province. The amount of the tax depended upon the paid-up capital and the number of offices or places of business of the bank, and it was contended by the appellant that such a tax was not a direct tax. In the argument in that case counsel for the appellant quoted the following definition taken from the well-known treatise of John Stuart Mill as the one he would prefer to abide by:—

"Taxes are either direct or indirect. A direct tax is one which

(1) 10 App. Cas. 141, *ante*, p. 362. (2) 12 App. Cas. 575, *ante*, p. 378.

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is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs.

[1914] *A. C.* *p.* 192.

"The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

In delivering the judgment of this Board, Lord Hobhouse says as follows: "Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellants' counsel, not only because it is that of an eminent writer, not with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present in the minds of those who passed the Federation Act" (1).

The taxation was held to come within the above definition of a direct tax, and accordingly the Act was held to be intra vires and valid.

In the year 1897 the same question came before this Board in a very similar case—*Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario* (2). The question in this case was as to whether an Act requiring brewers and distillers in the Province of Ontario to take out licences was ultra vires of the provincial Legislature. Lord Herschell, in delivering the opinion of the Board, treated the question as being settled by the decision in *Bank of Toronto* v. *Lambe* (3), and referring to the decision in that case he says:

"Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious indicia of direct and indirect taxation which were likely to have been present to the minds of those who passed the Federation Act.

[1914] *A. C.* *p.* 193.

"The definition referred to is in the following terms: 'A direct tax is one which is demanded from the very persons who it is

(1) *Post*, p. 384. (2) [1897] A. C. 231, *ante*, p. 533.
(3) 12 App. Cas. 575, *ante*, p. 378.

intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs.' In the present case, as in *Lambe's Case* (1), their Lordships think the tax is demanded from the very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person."

Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase "direct taxation" in s. 92 of the British North America Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill, and that this question is no longer open to discussion. It remains to consider whether the succession duty imposed in the present case would be within this definition if it be taken that the duty is imposed on all the property of the testator, wherever situate.

For the purpose of deciding this question it will be necessary to examine closely the legislation imposing it. The provisions of the Act leave much to be desired in respect of clearness. The definition of "property" contained therein is admittedly too wide if it is intended to form a basis for provincial taxation, since it would include the movable property of any person who might be resident in the province at the time of his death, whether domiciled therein or not. But, putting aside such considerations, the appellants not only admit, but contend, that the Act imposes a succession duty upon all movable property, wherever situated, of a testator domiciled in the province. This succession duty varies with the amount of the property and the degree of consanguinity of the persons to whom it is transmitted. The method of collection appears to be as follows: There is nothing corresponding to probate in the English sense, but there is (under art. 1191g) an obligation on "every heir, universal legatee, legatee by general or particular title, executor, trustee, and administrator, or notary before whom a will has been executed" to forward within a specified time to the collector of provincial revenue a complete schedule of the estate, together with a declaration under oath setting forth various matters relating thereto. Although this is an obligation on each member of each of the above classes, it is provided that "the declaration duly made by one of the above-named persons relieves the others as regards such declaration." On receipt of such declaration the following provisions of the above article with regard to the payment of the duty come into force:—

[1914] A. C. p. 194.

(1) 12 App. Cas. 575, *ante*, p. 378.

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"(4) . . . the said collector shall cause to be prepared a statement of the amount of the duties to be paid by the declarant.

"(5.) Such collector of provincial revenue shall inform the declarant of the amount due as aforesaid, by registered letter mailed to his address, and notify him to pay the same within thirty days after the notice is sent; and, if the amount is not then paid to him on the day fixed, the collector of provincial revenue may sue for the recovery thereof before any Court of competent jurisdiction in his own district.

"(6.) No transfer of the properties of any estate or succession shall be valid, nor shall any title vest in any person, if the taxes payable under this section have not been paid, and no executor, trustee, administrator, curator, heir or legatee shall consent to any transfers or payments of legacies, unless the said duties have been paid."

Their Lordships can only construe these provisions as entitling the collector of Inland Revenue to collect the whole of the duties on the estate from the person making the declaration, who may (and as we understand in most cases will) be the notary before whom the will is executed and who must recover the amount so paid from the assets of the estate or, more accurately, from the persons interested therein.

[1914] *A. C.* *p.* 195.

To determine whether such a duty comes within the definition of direct taxation it is not only justifiable but obligatory to test it by examining ordinary cases which must arise under such legislation. Take, for instance, the case of movables such as bonds or shares in New York bequeathed to some person not domiciled in the province. There is no accepted principle in international law to the effect that nations should recognize or enforce the fiscal laws of foreign countries, and there is no doubt that in such a case the legatee would, on duly proving the execution of the will, obtain the possession and ownership of such securities after satisfying the demands, if any, of the fiscal laws of New York relating thereto. How, then, would the Provincial Government obtain the payment of the succession duty? It could only be from some one who was not intended himself to bear the burden but to be recouped by some one else. Such an impost appears to their Lordships plainly to lie outside the definition of direct taxation accepted by this Board in previous cases.

Although the case just referred to is probably one of the most striking instances of the excess of these duties beyond the legal limits of the powers of the provincial Legislature it is by no means the only one. Indeed, the whole structure of the scheme of these succession

duties depends on a system of making one person pay duties which he is not intended to bear but to obtain from other persons. This is not in return for services rendered by the Government as in the cases where local probate has been necessary and fees have been charged in respect thereof. It is an instance of pure taxation, in which the payment is obtained from persons not intended to bear it within the meaning of the accepted definition above referred to, and their Lordships are therefore compelled to hold that the taxation is not "direct taxation," and that the enactment is therefore ultra vires on the part of the Provincial Government. On this ground, therefore, the appeal must be allowed.

Much of the argument before their Lordships related to the cases of *Harding* v. *Commissioners of Stamps for Queensland* (1), *Lambe* v. *Manuel* (2), *Rex* v. *Lovitt* (3), and *Woodruff* v. *Attorney-General for Ontario* (4). [1914] A. C. p. 196.

Their Lordships are of opinion that the discussion of these cases is not necessary for the decision of the present case. *Harding* v. *Commissioners of Stamps for Queensland* (1) related solely to the interpretation of the Queensland Succession and Probate Duties Act, 1892, and throws no light on the questions involved in the present case. *Lambe* v. *Manuel* (2) decided nothing further than that the Quebec Succession Duty Act of 1892 applied only to property which a successor claims under and by virtue of Quebec law, and this also is not in issue in the present case. In the case of *Rex* v. *Lovitt* (3) no question arose as to the power of a province to levy succession duty on property situated outside the province. It related solely to the power of a province to require as a condition for local probate on property within the province that a succession duty should be paid thereon. The decision in the case of *Woodruff* v. *Attorney-General for Ontario* (4) was much relied upon on behalf of the appellants, but the circumstances of the case were so special, and there is so much doubt as to the reasoning on which the decision was based, that their Lordships have felt that it is better not to treat it as governing or affecting the present decision, and they have accordingly decided the present case entirely independently of that decision.

Their Lordships will, therefore, humbly advise His Majesty that the appeal of Charles S. Cotton and another be allowed and the cross-appeal of the Crown dismissed. This is equivalent to

(1) [1898] A. C. 769.
(2) [1903] A. C. 68, *ante*, p. 580.
(3) [1912] A. C. 212, *ante*, p. 700.
(4) [1908] A. C. 508, *ante*, p. 662.

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directing that the decision of the Court of King's Bench (Appeal side) be restored. The respondent to the principal appeal will pay the costs of the appeal to the Supreme Court of Canada and of these appeals.

Solicitors for appellants: *Capel Cure & Ball.*
Solicitors for respondent: *Charles Russell & Co.*

J. C.* 1914

July 15, 17, 20, 21; *Nov.* 2.

JOHN DEERE *v.* WHARTON [1915], A. C. 330.

JOHN DEERE PLOW COMPANY, LIMITED. APPELLANTS;

AND

THEODORE F. WHARTON . . . . . RESPONDENT.

AND CONNECTED APPEAL CONSOLIDATED.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA AND ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA . . . . . INTERVENANTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Canada—Legislative Authority—Company incorporated by Dominion Parliament—Restriction of Corporate Rights in Province—Ultra vires—Companies Act of Canada (*R. S. Can.*, 1906, *c.* 79)—*Companies Act of British Columbia* (*R. S. B. C.*, 1911, *c.* 39), *Part VI.—British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91 *and* 92.

The authority of the Parliament of Canada to legislate for "the regulation of trade and commerce" conferred by s. 91, enumeration 2, of the British North America Act, 1867, enables that Parliament to prescribe the extent and limits of the powers of companies the objects of which extend to the entire Dominion; the status and powers of a Dominion company as such cannot be destroyed by a provincial Legislature.

Part VI. of the Companies Act of British Columbia (R. S. B. C., 1911, c. 39), which in effect provides that companies incorporated by the Dominion Parliament shall be licensed or registered under that Act as a condition of carrying on business in the Province or maintaining proceedings in its Courts, is therefore ultra vires the provincial Legislature under the British North America Act, 1867.

Consolidated Appeals by special leave from two judgments of the Supreme Court of British Columbia (May 26 and 28, 1913).

The appellants were a company incorporated by letters patent

* *Present*:—VISCOUNT HALDANE L.C., LORD MOULTON, LORD SUMNER, SIR CHARLES FITZPATRICK, and SIR JOSHUA WILLIAMS.

under the authority of the Companies Act of Canada (R. S. Can., 1906, c. 79) and were empowered by their charter to carry on throughout the Dominion the business of dealers in agricultural implements.

The first appeal was in an action brought against the appellants by the respondent Wharton, as a shareholder in the company, claiming an injunction to restrain the appellants from carrying on business within the Province without being licensed or registered as provided by the Companies Act of British Columbia (R. S. B. C., 1911, c. 39). [1915] *A. C.* *p.* 331.

The second appeal was in an action brought by the appellants to recover the price of goods sold and delivered by them to G. W. Duck, the respondent in that appeal, who pleaded that the action was not maintainable since the appellants were not so licensed or registered.

The question for determination in the actions and in the consolidated appeals was whether Part VI. of the Companies Act of British Columbia was ultra vires the legislative authority of the Province under the British North America Act, 1867.

The relevant provisions of the Companies Act of Canada and of the Companies Act of British Columbia are summarized in the judgment of their Lordships.

The effect of Part VI. of the provincial Act is, inter alia, to require that every company incorporated otherwise than under the law of the Province should be licensed or registered under the provincial law, and that until it is so licensed or registered it should not be capable of carrying on business in the Province or of maintaining proceedings in the provincial Courts in respect of any contract made within the Province. The appellants had applied for a licence, but their application was refused by the registrar on the ground that there was another company of the same name upon the register, in which case s. 18 of the above-mentioned provincial Act (as amended by s. 6 of c. 3 of the Acts of British Columbia for 1912) prohibits the grant of a licence.

Both actions were tried by Gregory J., who granted an injunction in the first action and dismissed the second upon the preliminary point of law raised by the pleadings. The learned judge considered himself bound by previous decisions of the Supreme Court of British Columbia, including that in *Waterous Engine Works* v. *Okanagan Lumber Co.* (1).

F. W. Wegenast, for the appellants; *Newcombe*, K.C., and *Raymond* [1915] *A. C.* *Asquith*, for the Attorney-General for Canada. The appellants are *p.* 332. a trading company duly incorporated under the authority of the

(1) (1908) 14 B. C. Rep. 238.

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Parliament of Canada and authorized by its charter to trade throughout the entire Dominion. The powers and privileges conferred upon them by s. 29 of the Companies Act of Canada as the effect of that incorporation cannot be controlled or limited by the provincial Legislature. The Parliament of Canada has exclusive powers as to the incorporation of companies with Dominion objects having regard to its legislative authority as to "the regulation of trade and commerce" under s. 91, enumeration 2, of the British North America Act, 1867. Even if the authority of the Parliament of Canada to incorporate the appellant company does not rest upon the specific power under s. 91, enumeration 2, it has authority under its general power over all matters not assigned exclusively to the provincial Legislatures; the authority of a provincial Legislature as to the incorporation of companies under s. 92, enumeration 11, is expressly confined to companies with provincial objects. The effect of the legislation complained of is to control and interfere with the corporate rights and privileges of the appellants and not merely to regulate the manner in which their business is to be carried on in the Province; it cannot therefore be justified under the general powers of the provincial Legislature as to "property and civil rights in the Province" (s. 92, enumeration 13) or any of the other general powers given by that section: *Citizens Insurance Co.* v. *Parsons* (1); *Dobie* v. *Temporalities Board* (2); *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (3); *Bank of Toronto* v. *Lambe* (4); *Attorney-General for Ontario* v. *Attorney-General for the Dominion.* (5) The authority of the Parliament of Canada in the matter is exclusive at any rate since the subject of the incorporation of companies is of sufficiently wide importance: *Brewers and Maltsters Association* v. *Attorney-General for Ontario.* (6) The decisions of the Supreme Court of British Columbia followed by the learned judge below must be considered as overruled by the decision of the Judicial Committee in *Compagnie Hydraulique* v. *Continental Heat and Light Co.* (7); that decision is conclusive in the appellants' favour. The legislation in question is not authorized by s. 92, enumeration 9, since the licence in this case was not imposed for the purpose of raising revenue, and it is not within the genus of the licences there referred to. [The Companies Act of British Columbia (R. S. B. C., 1907, c. 39), ss. 2, 18, 139, 152, 153, 157, 166 to 168, 170, and 173; the Companies Act of Canada (R. S. Can., 1906, c. 79), ss. 5, 10,

[1915] *A. C. p.* 333.

(1) (1881) 7 App. Cas. 96.
(2) (1881) 7 App. Cas. 136.
(3) (1883) 9 App. Cas. 157.
(4) (1887) 12 App. Cas. 575.
(5) [1896] A. C. 348.
(6) [1897] A. C. 231.
(7) [1909] A. C. 194.

12, and 30; the Interpretation Act (R. S. Can., 1906, c. 1), s. 30; *Cunningham* v. *Tomey Homma* (1); and *Union Colliery Co.* v. *Bryden* (2) were also referred to.]

Lafleur, K.C., for the respondents; *Sir R. Finlay*, K.C., and *Geoffrey Lawrence*, for the Attorney-General for British Columbia. The legislation in the appeals is authorized by s. 92, enumeration 13, of the British North America Act, 1867, that enumeration being "property and civil rights in the Province"; also by s. 92, enumeration 16, which refers to "all matters of a merely local or private nature." While the Parliament of Canada can incorporate a company to carry on business throughout the Dominion, the company's operations in each Province must be subject to regulation by the laws of that Province in all matters falling within those two enumerated objects: *Colonial Building and Investment Association* v. *Attorney-General of Quebec*. (3) The decision in *Union Colliery Co.* v. *Bryden* (2) is distinguishable as the legislation there in question was not genuine coal regulation at all. The Dominion power as to the incorporation of companies does not fall within "the regulation of trade and commerce," but is conferred by the general power contained in s. 91 to make laws for the peace, order, and good government of Canada, and it consequently does not override the powers of the Province under s. 92. The express power given in s. 91, enumeration 15, to incorporate banks shows that incorporation is not included in the powers as to the regulation of trade and commerce. In any case the power under s. 91, enumeration 2, does not extend to the regulation of trade of a purely local character: *Citizens Insurance Co.* v. *Parsons*. (4) The legislation questioned in *Dobie* v. *Temporalities Board* (5) went beyond the local limits of the authority, and the decision in *Union Colliery Co.* v. *Bryden* (2) is distinguishable as the judgment shows that the legislation was not a genuine mining regulation. The decision in *Compagnie Hydraulique* v. *Continental Heat and Light Co.* (6) rests upon the fact that the company was given power to operate works without restriction as to the works being in one province; clauses to this effect appear in the record though not in the report. Sir Arthur Wilson did not intend to lay down the broad unqualified proposition appearing at the end of the judgment; if he did it was overruled by the judgment in *City of Montreal* v. *Montreal Street Railways Co.* (7) The provincial Legislature had power to impose the licences under s. 92, enumerations 2 and 9; *Bank of Toronto* v.

[1915] *A. C.* *p.* 334.

(1) [1903] A. C. 151.
(2) [1899] A. C. 580.
(3) 9 App. Cas. 157.
(4) 7 App. Cas. 96.
(5) 7 App. Cas. 136.
(6) [1909] A. C. 194.
(7) [1912] A. C. 333.

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Lambe (1); *Brewers and Maltsters Case.* (2) [The opinions delivered in the Supreme Court of Canada in *In re Companies* (3) were referred to.]

Wegenast replied.

[VISCOUNT HALDANE L.C. The Attorneys-General as intervenants in private litigation are only entitled to present their views to the Committee and have not a right of reply.]

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Nov. 2.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. These are consolidated appeals from judgments of the Supreme Court of British Columbia. The Attorney-General for the Dominion and the Attorney-General for the Province have intervened.

By the first of the judgments the appellant company was restrained at the suit of the respondent Wharton from carrying on business in the Province until the company should have become licensed under Part VI. of the British Columbia Companies Act. By the second judgment the appellants' action against the respondent Duck for goods sold and delivered was dismissed. The real question in both cases is one of importance. It concerns the distribution between the Dominion and the provincial Legislatures of powers as regards incorporated companies.

[1915] *A. C. p.* 335.

The appellants are a company incorporated in 1907 by letters patent issued by the Secretary of State for Canada under the Companies Act of the Dominion. The letters patent purported to authorize it to carry on throughout Canada the business of a dealer in agricultural implements. It has been held by the Court below that certain provisions of the British Columbia Companies Act have been validly enacted by the provincial Legislature. These provisions prohibit companies which have not been incorporated under the law of the Province from taking proceedings in the Courts of the Province in respect of contracts made within the Province in the course of their business, unless licensed under the provincial Companies Act. They also impose penalties on a company and its agents if, not having obtained a licence, it or they carry on the company's business in the Province. The appellant was refused a licence by the registrar. It was said that there was already a company registered in the Province under the same name, and s. 18 of the provincial statute prohibits the grant of a licence in such a case. The question which has to be determined is whether the legislation of the Province which imposed these prohibitions was valid under the British North America Act.

(1) 12 App. Cas. 575. (2) [1897] A. C. 231.
(3) (1913) 48 Can. S. C. R. 331.

The Companies Act of the Dominion provides by s. 5 that the Secretary of State may, by letters patent, grant a charter to any number of persons not less than five, constituting them and others who have become subscribers to a memorandum of agreement a body corporate and politic for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, with certain exceptions which do not affect the present case. The Interpretation Act of 1906, by s. 30, provides, among other things, that words making any association or number of persons a corporation shall vest in such corporation power to sue and be sued, to contract by their corporate name, and to acquire and hold personal property for the purposes for which the corporation is created, and shall exempt individual members of the corporation from personal liability for its debts, obligations, or acts, if they do not violate the provisions of the Act incorporating them.

[1915] *A. C.* p. 336.

Sect. 10 of the Companies Act makes it a condition of the issue of the letters patent that the applicants shall satisfy the Secretary of State that the proposed name of the company is not the name of another known incorporated or unincorporated company, or one likely to be confounded with any such name, and s. 12 gives him large powers of interference as regards the corporate name. Sect. 29 provides that on incorporation the company is to be vested with, among other things, all the powers, privileges, and immunities requisite or incidental to the carrying on of its undertaking, as if it were incorporated by Act of Parliament. Sect. 30 enacts that the company shall have an office in the city or town in which its chief place of business in Canada is situate, which shall be the legal domicil of the company in Canada, and that the company may establish such other offices and agencies elsewhere as it deems expedient. By s. 32 it is provided that the contract of an agent of the company made within his authority is to be binding on the company, and that no person acting as such agent shall be thereby subjected to individual liability.

Turning to the relevant provisions of the British Columbia Companies Act, these may be summarized as follows: An extra-provincial company means any duly incorporated company other than a company incorporated under the laws of the Province or the former Colonies of British Columbia and Vancouver Island (s. 2). Every such extra-provincial company having gain for its object must be licensed or registered under the law of the Province, and no agent is to carry on its business within the Province until this has been done (s. 139). Such licence or registration enables it to sue and to hold land in the Province (s. 141). An extra-provincial company,

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if duly incorporated by the laws of, among other authorities, the Dominion, and if duly authorized by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the provincial Legislature extends, may obtain from the registrar a licence to carry on business within the Province on complying with the provisions of the Act and paying the proper fees (s. 152). If such a company carries on business without a licence, it is liable to penalties (s. 167), and the agents who act for it are similarly made liable, and the company cannot sue in the Courts of the Province in respect of contracts made within the Province (s. 168). The registrar may refuse a licence when the name of the company is identical with or resembling that by which a company, society, or firm in existence is carrying on business, or has been incorporated, licensed, or registered, or when the registrar is of opinion that the name is calculated to deceive, or disapproves of it for any other reason (s. 18).

[1915] *A. C.* *p.* 337.

The charter of the appellant company was granted under the seal of the Secretary of State of the Dominion in 1907. It purported, as already stated, to confer power to carry on throughout the Dominion of Canada and elsewhere the business of a dealer in agricultural implements and cognate business, and to acquire real and personal property. It is not in dispute that it was an extra-provincial company having gain for its object. The chief place of business was to be Winnipeg. The registrar refused, as has been mentioned, to grant a licence under the provincial Act to the appellant company. The power of the registrar is not challenged, if the sections of the provincial statute under which he proceeded were validly enacted.

What their Lordships have to decide is whether it was competent to the Province to legislate so as to interfere with the carrying on of the business in the Province of a Dominion company under the circumstances stated.

The distribution of powers under the British North America Act, the interpretation of which is raised by this appeal, has been often discussed before the Judicial Committee and the tribunals of Canada, and certain principles are now well settled. The general power conferred on the Dominion by s. 91 to make laws for the peace, order, and good government of Canada extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the Legislatures of the Provinces. But if the subject-matter falls within any of the heads of s. 92, it becomes necessary to see whether it also falls within any of the enumerated heads of s. 91, for if so, by the concluding words of that section it is excluded from the powers conferred by s. 92.

[1915] *A. C.* *p.* 338.

Before proceeding to consider the question whether the provisions already referred to of the British Columbia Companies Act, imposing restrictions on the operations of a Dominion company which has failed to obtain a provincial licence, are valid, it is necessary to realize the relation to each other of ss. 91 and 92 and the character of the expressions used in them. The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them the remark applies which was made by this Board about the Australian Commonwealth Act in a recent case (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1)), that if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decision.

The structure of ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* (2) to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words "civil

[1915] A. C. p. 339.

(1) [1914] A. C. 254.

(2) 7 App. Cas. 96, at p. 109.

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rights" in particular cases. An abstract logical definition of their scope is not only, having regard to the context of ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases. But it may well be impossible to give abstract answers to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context.

Turning to the appeal before them, the first observation which their Lordships desire to make is that the power of the provincial Legislature to make laws in relation to matters coming within the class of subjects forming No. 11 of s. 92, the incorporation of companies with provincial objects, cannot extend to a company such as the appellant company, the objects of which are not provincial. Nor is this defect of power aided by the power given by No. 13, Property and Civil Rights. Unless these two heads are read disjunctively the limitation in No. 11 would be nugatory. The expression "civil rights in the Province" is a very wide one, extending, if interpreted literally, to much of the field of the other heads of s. 92 and also to much of the field of s. 91. But the expression cannot be so interpreted, and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words. If this be so, then the power of legislating with reference to the incorporation of companies with other than provincial objects must belong exclusively to the Dominion Parliament, for the matter is one "not coming within the classes of subjects" "assigned exclusively to the Legislatures of the Provinces," within the meaning of the initial words of s. 91, and may be properly regarded as a matter affecting the Dominion generally and covered by the expression "the peace, order, and good government of Canada."

[1915] *A. C.* p. 340.

Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* (1) on head 2 of s. 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head

(1) 7 App. Cas. 96, at pp. 112, 113.

must, like the expression, "Property and Civil Rights in the Province," in s. 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. Their Lordships are therefore of opinion that the Parliament of Canada had power to enact the sections relied on in this case in the Dominion Companies Act and the Interpretation Act. They do not desire to be understood as suggesting that because the status of a Dominion company enables it to trade in a province and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the provincial Legislatures over civil rights in general. No doubt this jurisdiction would conflict with that of the Province if civil rights were to be read as an expression of unlimited scope. But, as has already been pointed out, the expression must be construed consistently with various powers conferred by ss. 91 and 92, which restrict its literal scope. It is enough for present purposes to say that the Province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the Province restricting the rights of the public in the Province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation. This conclusion appears to their Lordships to be in full harmony with what was laid down by the Board in *Citizens Insurance Co.* v. *Parsons* (1), *Colonial Building and Investment Association* v. *Attorney-General for Quebec* (2), and *Bank of Toronto* v. *Lambe.* (3)

[1915] *A. C.* p. 341.

It follows from these premises that those provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial licence of the kind about which the controversy has arisen, or to be registered in the Province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the Province and relating to civil rights, or taxation, or the

(1) 7 App. Cas. 96. (2) 9 App. Cas. 157.
(3) 12 App. Cas. 575.

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administration of justice. It is in reality whether the Province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of opinion that this question must be answered in the negative.

In the course of the argument their Lordships gave consideration to the opinions delivered in 1913 by the judges of the Supreme Court of Canada in response to certain abstract questions on the extent of the powers which exist under the Confederation Act for the incorporation of companies in Canada. Two of these questions bear directly on the topics now under discussion. The sixth question was whether the Legislature of a province has power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province in the absence of a licence from its Government, if fees are required to be paid upon the issue of such licence. The seventh question was whether the provincial Legislature could restrict a company so incorporated for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred, or could limit such exercise within the province. This question further raised the point whether a Dominion trading company was subject to provincial legislation limiting the business which corporations not incorporated under the legislation of the province could carry on, or their powers, or imposing conditions on the engaging in business by such corporations, or restricting a Dominion company otherwise in the exercise of its corporate powers or capacity.

[1915] *A. C.* *p.* 342.

Their Lordships have read with care the opinions delivered by the members of the Supreme Court, and are impressed by the attention and research which the learned judges brought to bear, in the elaborate judgments given, on the difficult task imposed on them. But the task imposed was, in their Lordships' opinion, an impossible one, owing to the abstract character of the questions put. For the reasons already indicated, it is impracticable to attempt with safety definitions marking out logical disjunctions between the various powers conferred by ss. 91 and 92 and between their various sub-heads inter se. Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of which individually the Courts have to determine on which side of a particular line the facts place them. But while in some cases it has proved, and may hereafter prove, possible to go further and to lay down a principle of general application, it results from what has been said about the language of the Confederation

Act that this cannot be satisfactorily accomplished in the case of general questions such as those referred to. It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by s. 92. Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the Province as to mortmain (*Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1)); or escape the payment of taxes, even though these may assume the form of requiring, as the method of raising a revenue, a licence to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe* (2)). Again, such a company is subject to the powers of the Province relating to property and civil rights under s. 92 for the regulation of contracts generally: *Citizens Insurance Co.* v. *Parsons*. (3)

[1915] A. C. p. 343.

To attempt to define a priori the full extent to which Dominion companies may be restrained in the exercise of their powers by the operation of this principle is a task which their Lordships do not attempt. The duty which they have to discharge is to determine whether the provisions of the provincial Companies Act already referred to can be relied on as justifying the judgments in the Court below. In the opinion of their Lordships it was not within the power of the provincial Legislature to enact these provisions in their present form. It might have been competent to that Legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the Province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the Province should, under a statute of general application regulating procedure, give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under s. 92 to the provincial Legislature. The analogy of the decision of this Board in *Union Colliery Co.* v. *Bryden* (4) therefore applies. They are unable to place the limited construction upon the word "incorporation" occurring in that section which was contended for by the respondents and by the learned counsel who argued the case for the Province. They think that the legislation in question really

[1915] A. C. p. 344.

(1) 9 App. Cas. 157, at p. 164.
(2) 12 App. Cas. 575.
(3) 7 App. Cas. 96.
(4) [1899] A. C. 580.

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strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion Government of companies with other than provincial objects.

They will therefore humbly advise His Majesty that these appeals should be allowed, and that judgment should be entered for the appellant company in the action of *Wharton* v. *John Deere Plow Company* with costs. The action by the company against the respondent Duck must, unless the parties come to an agreement, be remitted to the Court below to be disposed of in accordance with the result of this appeal. As to the interveners, the Attorney-General of the Dominion and the Attorney-General of the Province, there will be no order as regards costs. The respondents, Wharton and Duck, must pay the costs of the appellant company of this appeal, excepting so far as these have been increased by the interventions.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondents: *Linklater, Addison & Brown.*

Solicitors for intervenants: *Charles Russell & Co., and Gard, Rook & Co.*

ALBERTA *v.* CANADA [1915] A. C. 36

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July 14, 15; *Oct.* 22.

ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA . . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . RESPONDENT.

CANADIAN PACIFIC RAILWAY COMPANY . INTERVENANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority of Province—Provincial Railways—Power to take Lands of Dominion Railway—Crossing Dominion Railway—Ultra vires—Alberta Railway Act (*Stat. of Alberta*, 1907, *c.* 8), *s.* 82, *sub-s.* 3—*Railway Act* (*R. S. Can.*, 1906, *c.* 37), *s.* 8—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91 *and* 92.

The Alberta Railway Act, s. 82, by sub-ss. 1 and 2, provides that a railway company authorized by that Act may, subject to the approval, order, or direction of the Lieutenant-Governor, take possession of, use, or occupy the lands belonging to any other railway company,

Sect. 7 of c. 15 of the Acts of the Legislature of Alberta for 1912 amends s. 82 above mentioned by adding sub-s. 3, which purports to apply its

* *Present:*—VISCOUNT HALDANE L.C., LORD MOULTON, LORD SUMNER, SIR CHARLES FITZPATRICK, and SIR JOSHUA WILLIAMS.

provisions to the lands of every railway company authorized otherwise than under the legislative authority of the Province, "in so far as the taking of such lands does not unreasonably interfere with the construction and operation" of the railway whose lands are taken:—

Held, (1.) that s. 7 above mentioned is ultra vires a provincial Legislature under the British North America Act, 1867, and that it would not be intra vires if the word "unreasonably" were omitted; (2.) that in a suitable case, having regard to the interests of the public, the Board of Railway Commissioners, acting under s. 8 of the Railway Act, may grant permission for a provincial railway to cross a Dominion railway, the crossing being regulated in accordance with those interests.

APPEAL by special leave from the decision of the Supreme Court of Canada (May 6, 1913) upon a reference under s. 60 of the Supreme Court Act.

The questions referred to the Supreme Court were as to the validity of s. 7 of c. 15 of the Acts of the Legislature of the Province of Alberta, that section being an amendment of s. 82 of the Railway Act (Statutes of Alberta, 1907, c. 8). Both the above sections and the questions referred to the Court are set out in full in the judgment of their Lordships. The effect of the legislation is shortly stated in the head-note.

[1915] *A. C.* *p.* 364.

Before the Supreme Court and in the argument before the Judicial Committee the effect of s. 7 as enabling a provincial railway to cross a Dominion railway was the substantial matter of contention.

The Supreme Court, consisting of Davies, Idington, Duff, Anglin, and Brodeur JJ., delivered its opinion on May 6, 1913 (Brodeur J. dissenting), that s. 7 was ultra vires the Alberta Legislature in its application to railway companies authorized by the Parliament of Canada, and that it would not be intra vires if amended by striking out the word "unreasonably."

The proceedings in the Supreme Court are reported at 48 Can. S. C. R. 9.

Sir R. Finlay, K.C., *S. B. Woods, K.C.* (Attorney-General for Alberta), and *G. Lawrence*, for the appellant. The legislation in question is intra vires the provincial Legislature under the British North America Act, 1867, s. 92, enumeration 10. The power to authorize a provincial railway to cross other railways, including Dominion railways, is necessarily incidental to the power to authorize the construction of a provincial railway. The authority of provincial Legislatures over "local works and undertakings" under s. 92, enumeration 10, is as complete as that of the Parliament of Canada under s. 91, enumeration 29, over the works and undertakings under heads (*a*), (*b*) and (*c*) of s. 92, enumeration 10. The Parliament of Canada, however, cannot debar a provincial railway from crossing a

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Dominion railway, subject to due regulation by the Railway Board, since that is not essential to the exercise of effective legislative jurisdiction over Dominion railways; on the other hand, if a provincial Legislature cannot enable a provincial railway to cross a Dominion railway, its power to authorize the construction of provincial railways becomes illusory, since the Province is crossed by many Dominion lines. [*Citizens Insurance Co.* v. *Parsons* (1), *Hodge* v. *The Queen* (2), *Tennant* v. *Union Bank of Canada* (3), *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (4), and *Grand Trunk Ry. Co.* v. *Attorney-General of Canada* (5) were referred to.] The Railway Board has no power under the Railway Act to debar a provincial railway from crossing a Dominion railway, if the crossing is authorized by the Legislature of the Province; its only power in the matter is to regulate the manner in which the crossing is to be effected. [Railway Act (R. S. Can., 1906, c. 37), ss. 5, 8, 151 (*e*), 176, 225 and 227, Alberta Railway Act (Stat. of Alberta, 1907, c. 8), ss. 69 (*e*) and 82, and *City of Montreal* v. *Montreal Street Railways Co.* (6) were referred to.]

[1915] *A. C.* p. 365.

Newcombe, K.C., and *Raymond Asquith*, for the respondent, and *Lafleur, K.C.*, for the intervenants, were not called upon.

1914 *Oct.* 22.

The judgment of their Lordships was delivered by

LORD MOULTON. The present appeal relates to two questions which were referred by H.R.H. the Governor in Council for the hearing and consideration of the Supreme Court of Canada pursuant to s. 60 of the Supreme Court Act. These questions relate to the validity of s. 7 of c. 15 of the Acts of the Legislature of the Province of Alberta of 1912, intituled an Act to amend the Railway Act.

Prior to the passing of the above Act, s. 82 of the Alberta Railway Act of 1907 stood in the following form: "The company may take possession of, use or occupy any lands belonging to any other railway company, use and enjoy the whole or any portion of the right of way, tracks, terminals, stations, or station grounds of any other railway company, and have and exercise full right and powers to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Lieutenant-Governor in Council first obtained, or to any order or direction which the Lieutenant-Governor in Council may make in regard to the exercise, enjoyment, or restriction of such powers or privileges.

"(2.) Such approval may be given upon application and notice,

[1915] *A. C.* p. 366.

(1) (1881) 7 App. Cas. 96.
(2) (1883) 9 App. Cas. 117.
(3) [1894] A. C. 31.
(4) [1896] A. C. 348.
(5) [1907] A. C. 65.
(6) [1912] A. C. 333.

and after hearing the Lieutenant-Governor in Council may make such order, give such directions, and impose such conditions or duties upon either party as to the said Lieutenant-Governor in Council may appear just or desirable having due regard for the public, and all proper interests, and all provisions of the law, at any time applicable to the taking of land and their valuation, and the compensation therefor and appeals from awards thereon shall apply to such lands, and in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada, it shall do so in addition to otherwise complying with this section."

By s. 7 of the amending Act of 1912 the following sub-section was added to s. 82 above referred to:—

"(3.) The provisions of this section shall extend and apply to the lands of every railway company or persons having authority to construct or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such land does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority."

The questions referred to the Supreme Court of Canada were as follows:—

"(1.) Is section 7 of chapter 15 of the Acts of the Legislature of Alberta of 1912 intituled 'An Act to amend the Railway Act' intra vires of the provincial Legislature in its application to railway companies authorized by the Parliament of Canada to construct or operate railways?

"(2.) If the said section be ultra vires of the provincial Legislature in its application to such Dominion railway companies, would the section be intra vires if amended by striking out the word 'unreasonably'?"

At the hearing before the Supreme Court of Canada it would seem that, by consent of counsel representing the Dominion Government and the Province of Alberta respectively, a third question was submitted to the Court for hearing and consideration. It was hypothetical in form and no answer was given to it by the Supreme Court. Their Lordships do not consider that this question should be regarded as forming part of the questions referred to the Supreme Court by H.R.H. the Governor in Council, or that it is included in the present appeal. No attempt was made to argue it at the hearing, and their Lordships do not propose to take further notice of it.

[1915] *A. C.* p. 367.

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By s. 92 of the British North America Act, 1867, it is enacted as follows:—"92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:— . . . .

"(10.) Local works and undertakings other than such as are of the following classes:—

"(*a*) Lines of steam or other ships railways canals telegraphs and other works and undertakings connecting the Province with any other or others of the Province or extending beyond the limits of the Province. . . . .

"(*c*) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

By s. 91 of the British North America Act, 1867, it is enacted as follows:—"91. . . . . It is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:— . . . .

"(29.) Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

It has never been doubted that these words refer to and include railways such as are mentioned in 92 (10.) (*a*) and (*c*) above quoted. Indeed the language seems to point to 92 (10.) so expressly that the contention is frequently heard that it is intended to refer to it solely. It is not necessary to decide that point in the present case. It suffices to say that railways such as are described in 92 (10.) (*a*) and (*c*) come under the exclusive legislative authority of the Parliament of Canada. The provincial Legislature therefore has no power to affect by legislation the line or works of such a railway. If authority were required for so plain and evident a conclusion from these statutory provisions, it is to be found in the judgments of their Lordships in the cases of *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1) and *Madden* v. *Nelson and Fort Sheppard Ry. Co.* (2).

[1915] *A. C.* p. 368.

The provisions of s. 82 of the Alberta Railway Act, 1907, do not in the opinion of their Lordships necessarily clash with these rights of legislation which thus exclusively belong to the Dominion Parliament, for it is possible to give to the words "railway company" the limited meaning of a company owning and operating a railway

(1) [1899] A. C. 367. (2) [1899] A. C. 626.

situated entirely within the Province, and to that extent the legislation is intra vires. But sub-s. 3, which was added by the Act of 1912 and the validity of which is under consideration, expressly extends s. 82 so as to make it apply to a Dominion railway. With this addition the provisions of s. 82 of the Railway Act, 1907, of the Legislature of Alberta unquestionably constituted legislation as to the physical construction and use of the track and buildings of a Dominion railway, and that of a serious and far-reaching character. Their Lordships have no hesitation therefore in pronouncing that sub-s. 3 is ultra vires of the Alberta Legislature.

They are further of opinion that it would not become intra vires if the word "unreasonably" were struck out of the section. It would still be legislation as to the physical track and works of the Dominion railway, and as such would be beyond the competence of the provincial Legislature. These are matters as to which the exclusive right to legislate has been accorded to the Parliament of the Dominion, so that the provincial Legislatures have no power of legislation as to them, and this holds good whether or not the legislation is such as might be considered by juries or judges to be reasonable.

It was no doubt due to the almost self-evident character of these propositions that at the hearing of the appeal before their Lordships but little attempt was made to support the validity of sub-s. 3 in its entirety. To judge by the reasons given by the learned judges of the Supreme Court in their judgments it would seem that much the same course was adopted in the argument before the Supreme Court. The true aim of the discussion seemed rather to obtain the opinion of the Court and of their Lordships upon hypothetical variations of the section which would have the effect of limiting its application. Indeed, in the hearing before their Lordships, counsel for the appellants practically confined their arguments to the single case of a provincial railway crossing the track of a Dominion railway. Their Lordships are of opinion that great care should be exercised in permitting questions thus referred to the Supreme Court to be varied, more especially when those questions come up on appeal for decision by their Lordships. It may no doubt happen that the questions relate to matters which are in their nature severable, so that the answers given may cast light upon the effect of the deletion or alteration of parts of the provisions the validity of which is being considered. But their Lordships do not desire to give any countenance to the view that counsel may vary the questions by hypothetical limitations not to be found in the provisions themselves or in the questions that relate to them.

[1915] *A. C.* *p.* 369.

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In the present instance, however, the case chosen by counsel for the appellants as the subject of their arguments has no doubt strong claims for separate consideration, inasmuch as it is doubtless the case which was mainly present to the mind of the provincial Legislature when considering sub-s. 3. It has reference to the circumstances under which the exclusive power of Parliament to legislate as to Dominion railways appears to operate most harshly on the freedom of action of the Province. It was urged with great force that if the provinces have no power to authorize their railways to cross the tracks of Dominion railways they might theoretically be placed in a position of great difficulty. Regarded in the abstract it might be possible for a tract of country situated in a province to be surrounded by Dominion railways in such a way that unless crossing were permitted a provincial railway situated within that tract would be completely isolated and cut off from access to other portions of the province. But the difficulty is essentially administrative, and not one that could be cured by any decision as to constitutional rights. It is scarcely too much to say that it would not be practicable to frame the actual claim of the Province in the present case in such a way that it could be a constitutional right possessed by a province. Even their own counsel admitted that the Province could not give to one of their railways the right to cross a Dominion railway at any place or in any specific way chosen by them. They admitted that the place and manner must be subject to the approval of the Railway Board, a body created by a Dominion statute in the year 1903, whose powers depend on a Dominion Railway Act. How could a constitutional right be measured or defined by the views or decisions of such a body—one which did not exist when the constitution was created?

[1915] *A. C.* p. 370.

It is therefore not in abstract constitutional rights but in administrative provisions that the remedy must be sought for the inconveniences which in the abstract might flow from the fact that the exclusive power of legislating as to Dominion railways is vested in Parliament. And in this respect the present form of the Dominion railway legislation indicates and in their Lordships' opinion provides an effective remedy. By s. 8 of the Dominion Railway Act Parliament treats in a special manner the crossing of Dominion railways by provincial railways. These portions of the provincial railways are made subject to the clauses of the Dominion railway legislation, which deal also with the crossings of two Dominion railways, so that the provincial railways are in such matters treated administratively in precisely the same way as Dominion railways themselves. The Parliament of the Dominion is entitled to legislate as to these crossings because they are upon the right of way and track of the Dominion

railway as to which the Dominion Parliament has exclusive rights of legislation, and moreover, as the provincial railways are there by permission and not of right, they can fairly be put under terms and regulations. But s. 8 of the Railway Act of the Dominion and the clauses which are by it made binding on any provincial railway crossing a Dominion railway appear to their Lordships to indicate that it is part of the functions of the Railway Board to permit and to regulate such crossings. They are left unfettered as to whether they will permit such crossings to be at any particular spot or to be carried out in any particular way, and this jurisdiction is essential to them as guardians of those powers of construction and operation of Dominion railways which are necessary for their existence and efficiency. But these powers of permitting crossings by provincial railways under suitable circumstances and with proper precautions have not been given to them idly and for no purpose. They bring with them the duty of using those powers for the benefit of the public whenever an occasion arises where they can be wisely used.

[1915] A. C. p. 371.

By these provisions the Dominion legislation has in their Lordships' opinion given to provincial railways desiring to cross a Dominion railway all the locus standi that they need for making an application to the Railway Board for permission to do so. The Railway Board is bound to exercise these powers given to it just as much as all other powers given to it so as to advance the best interests of the public. In this way the legitimate claims of provincial railways to obtain facilities for crossing Dominion railways are in fact met as fully as is practicable, and this without risking the chaos of overlapping legislative powers.

Their Lordships are therefore of opinion that both the questions submitted to the Supreme Court of Canada should be answered in the negative and that the decision appealed from was correct. They will accordingly humbly advise His Majesty that this appeal should be dismissed, but without costs.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Lawrence Jones & Co.*

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